DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 11-159
Title: Michael J. Astrue, Commissioner of Social Security, Petitioner
v.
Karen K. Capato, on Behalf of B. N. C., et al.
Docketed: August 9, 2011
Linked with 10A1165
Lower Ct: United States Court of Appeals for the Third Circuit
Case Nos.: (10-2027)
Decision Date: January 4, 2011
Rehearing Denied: March 9, 2011
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
May 27 2011	Application (10A1165) to extend the time to file a petition for a writ of certiorari from June 7, 2011 to July 7, 2011, submitted to Justice Alito.
May 27 2011	Application (10A1165) granted by Justice Alito extending the time to file until July 7, 2011.
Jun 27 2011	Application (10A1165) to extend further the time to file a petition for a writ of certiorari from July 7, 2011 to August 6, 2011, submitted to Justice Alito.
Jun 30 2011	Application (10A1165) granted by Justice Alito extending the time to file until August 8, 2011.
Aug 8 2011	Petition for a writ of certiorari filed. (Response due September 8, 2011)
Sep 2 2011	Order extending time to file response to petition to and including October 11, 2011.
Oct 11 2011	Brief of respondents Karen K. Capato, on Behalf of B. N. C., et al. in opposition filed.
Oct 19 2011	DISTRIBUTED for Conference of November 4, 2011.
Oct 26 2011	DISTRIBUTED for Conference of November 10, 2011.
Oct 26 2011	Reply of petitioner Michael J. Astrue, Commissioner of Social Security filed. (Distributed)
Nov 14 2011	Petition GRANTED.
Dec 19 2011	SET FOR ARGUMENT ON MONDAY, March 19, 2012
Dec 29 2011	Appendix of Michael J. Astrue, Commissioner of Social Security filed.
Dec 29 2011	Brief of petitioner Michael J. Astrue, Commissioner of Social Security filed.
Dec 30 2011	Motion to dispense with printing the joint appendix filed by petitioner Michael J. Astrue, Commissioner of Social Security.
Jan 4 2012	Record from the U.S.C.A. for 3rd Circuit and the Social Security Administration is electronic. There are sealed document in this record.
Jan 6 2012	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Jan 30 2012	Brief of respondents Karen K. Capato, on Behalf of B. N. C., et al. filed.

Jan 31 2012	CIRCULATED.
Feb 3 2012	Brief amicus curiae of Cancer Legal Resource Center of the Disability Rights Legal Center filed. (Distributed)
Feb 6 2012	Brief amici curiae of Jennifer Lahl, et al. filed. (Distributed)
Feb 6 2012	Brief amici curiae of National Senior Citizens Law Center, et al. filed. (Distributed)
Feb 13 2012	Record received from U.S.D.C. for the District of New Jersey. (1(box) There are sealed documents in this record..
Feb 29 2012	Reply of petitioner Michael J. Astrue, Commissioner of Social Security filed. (Distributed)
Mar 19 2012	Argued. For petitioners: Eric D. Miller, Assistant to the Solicitor General, Department of Justice, Washington, D. C. For respondents: Charles A. Rothfeld, Washington, D. C.
May 21 2012	Judgment REVERSED and case REMANDED. Ginsburg, J., delivered the opinion for a unanimous Court.
Jun 22 2012	JUDGMENT ISSUED.

PETITION FOR WRIT OF CERTIORARI

No. 11-159

In the Supreme Court of the United States

MICHAEL J. ASTRUE,
COMMISSIONER OF SOCIAL SECURITY, PETITIONER

v.

KAREN K. CAPATO, ON BEHALF OF B.N.C., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a child who was conceived after the death of a biological parent, but who cannot inherit personal property from that biological parent under applicable state intestacy law, is eligible for child survivor benefits under Title II of the Social Security Act, 42 U.S.C. 401 *et seq.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of Michael J. Astrue, Commissioner of Social Security, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-12a) is reported at 631 F.3d 626. The order of the district court (App., *infra*, 15a-32a) is unreported. The decision of the administrative law judge (App., *infra*, 33a-47a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 2011. A petition for rehearing was denied on

March 9, 2011 (App., *infra*, 13a-14a). On May 27, 2011, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including July 7, 2011. On June 30, 2011, Justice Alito further extended the time to August 8, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Pertinent statutory provisions are set forth in an appendix to this petition. App., *infra*, 48a-59a.

STATEMENT

1. Title II of the Social Security Act (the Act), 42 U.S.C. 401 *et seq.*, provides retirement and disability benefits to insured wage earners. In 1939, Congress amended Title II to provide benefits to a deceased wage earner's surviving family members, including minor children, who were dependent on the wage earner before his or her death. Social Security Act Amendments of 1939, ch. 666, Tit. II, 53 Stat. 1362.

As relevant here, three statutory provisions now govern the availability of child survivor benefits. First, under 42 U.S.C. 402(d)(1), benefits are available to "[e]very child (as defined in section 416(e) of this title) of * * * an individual who dies a fully or currently insured individual," provided that the individual has made an application for benefits, is a minor or is disabled, and was dependent on the deceased wage earner at the time of death. 42 U.S.C. 402(d)(1). Second, Section 416(e) provides that "[t]he term 'child' means * * * the child or legally adopted child of an individual," and also provides that "child" means a "stepchild," "grandchild," or "stepgrandchild," so long as certain conditions are met. 42 U.S.C. 416(e)(1)-(3). Third, Section 416(h)(2)(A) directs that "[i]n determining whether an applicant is the

child" of a deceased wage earner, "the Commissioner of Social Security shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which" the wage earner "was domiciled at the time of his death." 42 U.S.C. 416(h)(2)(A).

2. In 1999, Robert Capato deposited sperm at a fertility clinic. He died in March 2002, and respondent, his widow, subsequently underwent in vitro fertilization using the frozen sperm. In September 2003, she gave birth to twins. App., *infra*, 2a-3a.

Respondent applied for Social Security benefits on behalf of her children as survivors of a deceased wage earner. The Social Security Administration (SSA) denied the claim, and respondent requested a hearing before an Administrative Law Judge (ALJ). App., *infra*, 3a.

The ALJ affirmed the denial of benefits. App., *infra*, 33a-47a. Relying on Section 416(h)(2)(A), the ALJ reasoned that a child conceived after the death of his or her biological father can establish eligibility for benefits only by "showing that the child could inherit the wage earner's property as his child under the intestacy laws of the state where the wage earner was domiciled when he died." *Id.* at 39a. In this case, the ALJ found, Mr. Capato had been domiciled in Florida at the time of his death, and Florida's law of intestate succession permits children born after the death of a parent to inherit only if they were "conceived before his or her death, but born thereafter." *Id.* at 40a (quoting Fla. Stat. Ann. § 732.106 (West 2005)); see *id.* Fla. Stat. Ann. § 742.17(4) (West 2010). "Because the twins cannot inherit a child's share of the wage earner's personal property, under Florida's intestacy law," the ALJ concluded that "they do not

qualify as the wage earner's 'children' under the Social Security Act." App., *infra*, 41a.

The Social Security Appeals Council denied review, making the ALJ's decision the final agency decision. App., *infra*, 16a; see 20 C.F.R. 404.955.

3. Respondent sought judicial review in the United States District Court for the District of New Jersey, and the district court affirmed the denial of benefits. App., *infra*, 15a-32a. The court determined that "[s]ubstantial evidence supports the ALJ's finding that the insured was domiciled in the State of Florida at the time of death," and it agreed with the ALJ that, because posthumously conceived children are excluded from intestate succession under Florida law, respondent's children were ineligible for benefits under Section 416(h)(2)(A). *Id.* at 24a.

4. The court of appeals reversed. App., *infra*, 1a-12a. Rejecting the agency's interpretation of the Act, the court held that Section 416(h)(2)(A)'s instruction to apply state intestacy law is applicable only in cases in which biological parentage is disputed. *Id.* at 10a. The court saw no reason "why, in the factual circumstances of this case, where there is no family status to determine, we would even *refer* to [Section] 416(h)." *Id.* at 7a. The court concluded that, under Section 416(e), "the undisputed biological children of a deceased wage earner and his widow [are] 'children' within the meaning of the Act," without regard to state intestacy law. *Id.* at 12a. The court therefore remanded "for a determination of whether, as of the date of Mr. Capato's death, his children were dependent or deemed dependent on him, the final requisite of the Act remaining to be satisfied." *Ibid.*

5. The court of appeals denied a petition for rehearing en banc. App., *infra*, 13a-14a.

REASONS FOR GRANTING THE PETITION

The Third Circuit's rejection of the Social Security Administration's longstanding and wholly reasonable interpretation of the Social Security Act warrants this Court's review. Since the provisions for child survivor benefits were first added to the Act in 1939, SSA has interpreted 42 U.S.C. 416(h)(2)(A) to mean exactly what it says—that in determining whether an applicant is the "child" of an insured wage earner for the purpose of obtaining survivor benefits, the agency "shall apply such law as would be applied in determining the devolution of intestate personal property" in the State in which the wage earner was domiciled at the time of his or her death. See, *e.g.*, 20 C.F.R. 404.355(a); 20 C.F.R. 403.832(a) (Supp. 1940). This case involves children conceived after the death of their father. Because the applicable state law would not confer intestacy rights in that context, SSA correctly determined that the children are not entitled to survivor benefits.

In reaching a contrary conclusion, the court of appeals held that because the children have a biological relationship with the deceased wage earner, they need not demonstrate a legal child-parent relationship with him under Section 416(h) in order to obtain benefits. That holding is contrary to the text, legislative history, and purposes of the Act, and it fails to give appropriate deference to SSA's longstanding and reasonable construction of the statute.

The question presented in this case is the subject of a circuit conflict. Like the court below, the Ninth Circuit has rejected SSA's interpretation of Section 416 as

applied to the biological but posthumously conceived children of a deceased wage earner. See *Gillett-Netting* v. *Barnhart*, 371 F.3d 593 (2004). On the other hand, the Fourth Circuit has ruled in the government's favor in an essentially identical case. See *Schafer* v. *Astrue*, 641 F.3d 49 (2011), pet. for reh'g denied (Aug. 1, 2011). The Fifth Circuit has also affirmed the agency's interpretation of Section 416(h) as applying to all applicants, not just those whose biological parentage is in dispute, see *Conlon ex rel. Conlon* v. *Heckler*, 719 F.2d 788, 800 (1983), and the District of Columbia and Sixth Circuits have expressed a similar view, see *Javier* v. *Commissioner of Soc. Sec.*, 407 F.3d 1244 (D.C. Cir. 2005); *DeSonier* v. *Sullivan*, 906 F.2d 228 (6th Cir. 1990).

The question of statutory interpretation raised by this case is of recurring significance in the administration of the Social Security program. In setting aside the agency's decision, the court of appeals disregarded a regulatory framework that applies to all applications for survivor benefits and that has been in place for more than 70 years. Because the question presented is both important and recurring, and because the decision below is wrong, this Court's resolution of the conflict is warranted.

A. The Decision Below Is Contrary To The Text, History, And Purposes Of The Social Security Act, And It Disregards The Agency's Reasonable Interpretation Of The Act

1. a. In order to obtain child survivor benefits under the Social Security Act, an applicant must establish, among other things, that he or she is the child of a deceased wage earner. Section 402(d) affords survivor benefits to "[e]very child (as defined in section 416(e) of

this title) * * * of an individual who dies a fully or currently insured individual," provided that the child "was dependent upon such individual * * * at the time" of the individual's death, and provided that certain other requirements not at issue here are met. 42 U.S.C. 402(d)(1). The definitions applicable to determining whether an applicant for survivor's benefits qualifies as a "child" are set forth in 42 U.S.C. 416, entitled "Additional definitions." Subsection (e) of 42 U.S.C. 416, referred to in Section 402(d)(1), defines "child" as, *inter alia*, "the child or legally adopted child of an individual." 42 U.S.C. 416(e)(1). Although Section 416(e) proceeds to define "legally adopted child" in some detail, it does not further define the word "child."

That further definition is supplied by Subsection (h) of Section 416, entitled "[d]etermination of family status." As relevant here, Subsection (h)(2) provides that, "[i]n determining whether an applicant is the child * * * of a fully or currently insured individual for purposes of this subchapter, the Commissioner of Social Security shall apply such law as would be applied in determining the devolution of intestate personal property * * * by the courts of the State in which [the insured] was domiciled at the time of his death." 42 U.S.C. 416(h)(2)(A). Subsections (h)(2)(B) and (h)(3)(C) of Section 416 then describe three alternative ways in which an applicant who does not satisfy that definition of a "child" under 42 U.S.C. 416(h)(2)(A) may nevertheless be "deemed" a child for purposes of Section 416(e). See 42 U.S.C. 416(h)(2)(B) (applicant is deemed a "child" if the insured and the other parent went through a marriage ceremony that would have been valid but for certain legal impediments), 42 U.S.C. 416(h)(3)(C)(i) (applicant is deemed a "child" if the insured had acknowl-

edged paternity in writing, had been decreed by a court to be a parent, or had been ordered to pay child support), 42 U.S.C. 416(h)(3)(C)(ii) (applicant is deemed a "child" if there is satisfactory evidence that the insured was the applicant's parent and the insured was living with or supporting the applicant at the time of the insured's death).

The court of appeals did not dispute that respondent's children do not qualify as the "children" of Mr. Capato under any of the four categories specified in Sections 416(h)(2) and (3). In particular, the court acknowledged that they do not qualify under Section 416(h)(2)(A) because the law of Florida—the State in which Mr. Capato was domiciled at the time of his death—would not recognize them as his children for purposes of intestate succession. App., *infra*, 7a; see Fla. Stat. Ann. § 732.106 (West 2005); *id.* § 742.17(4) (West 2010). Accordingly, they are not eligible for Social Security benefits as his surviving children.

b. In reaching a contrary conclusion, the court of appeals effectively engrafted onto the statute an amorphous fifth category of eligibility, covering applicants who are "undisputed biological children" of deceased wage earners. App., *infra*, 10a. Tellingly, the court of appeals made little effort to locate its standard in the text of the statute, other than to make clear that it is *not* found in Section 416(h). *Id.* at 11a ("[W]e do not read [Sections] 402(d) or 416(e) as requiring reference to [Section] 416(h) to establish child status."). But neither Section 402(d)(1) nor Section 416(e)—nor, for that matter, Sections 416(h)(2) or (3)—uses the term "undisputed biological child[]" or "biological child" in defining whether an applicant qualifies as a "child." And there is no basis in the Act for adding to Section 416(h)(2) and

(3)'s carefully drawn list of situations in which an applicant qualifies as a "child" for purposes of Section 416(e). To the contrary, the mandatory language of Section 416(h)(2)(A)—"[i]n determining whether an applicant is the child * * * the Commissioner * * * *shall* apply such law," 42 U.S.C. 416(h)(2)(A) (emphasis added)—demonstrates that the test set out in that provision is exclusive, where, as here, the alternative tests in 42 U.S.C. 416(h)(2)(B) and (3)(C) are not satisfied.

The court of appeals saw no need to refer to Section 416(h) because, in its view, the text of Section 416(e) "is so clear." App., *infra*, 10a. As the Fifth Circuit has observed, however, the "definitional tautology" in Section 416(e)—*i.e.*, "a 'child' is a child"—"does not provide much guidance" in determining whether an applicant qualifies as the child of a deceased wage earner as a legal matter. *Conlon*, 719 F.2d at 800; cf. *United States* v. *Bestfoods*, 524 U.S. 51, 56, 66 (1998) (describing the definition of "owner or operator" in the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601(20)(A)(ii) ("any person owning or operating such facility"), as a "tautology" that is "useless[]" in construing the statute). Indeed, "it is not clear just how the SSA *could* give 'full meaning' to the statutory proposition that 'a "child" is a child' without help from neighboring provisions." *Schafer*, 641 F.3d at 56. Even the court of appeals acknowledged that it is easy to imagine cases in which the determination of biological parentage is complex. App., *infra*, 11a (noting that "[t]he use of donor eggs, artificial insemination, and surrogate wombs could result in at least five potential parents") (citation omitted). As the Fourth Circuit correctly concluded, "it [is] very unlikely Congress would have left the SSA so utterly in the dark about such a

critical term." *Schafer*, 641 F.3d at 55. And, in fact, Congress did not do so. Its "more comprehensive effort[]" to supply a definition in Section 416(h) provides a "plain and explicit instruction on how the determination of child status should be made." *Ibid.*

That does not mean that Section 416(e) does no work in the statutory scheme. To the contrary, Section 416(e)(1) clarifies that both natural children and legally adopted children are eligible for benefits; Section 416(e)(2) includes certain stepchildren; and Section 416(e)(3) includes even certain grandchildren and stepgrandchildren. The inclusion of those potential beneficiaries "importantly expands the scope of the Act and distinguishes it from narrower benefits programs." *Schafer*, 641 F.3d at 56; cf. *Cleland* v. *OPM*, 984 F.2d 1193, 1195 (Fed. Cir. 1993) (holding that grandchildren are not entitled to survivorship benefits under the civil service retirement program, 5 U.S.C. 8341(e)(2), because they are not specifically identified in that statute).

By contrast, the court of appeals' reading of the statute makes several provisions of Section 416(h) superfluous. Section 416(h)(2)(B) provides that a child who is ineligible to inherit under state law may nevertheless be deemed a "child" if he or she "is the son or daughter of [the] insured" and if his or her parents "went through a marriage ceremony resulting in a purported marriage between them which, but for a legal impediment * * * would have been a valid marriage." 42 U.S.C. 416(h)(2)(B). Similarly, Section 416(h)(3)(C)(ii) applies to a child who cannot inherit under state law, provided that the insured wage earner was "the mother or father of the applicant" and was "living with or contributing to the support of the applicant" at the time of the insured's death. 42 U.S.C. 416(h)(3)(C)(ii). If being an "undis-

puted biological child[]" were sufficient for eligibility, then neither of those provisions would serve any purpose, since each of them applies only to applicants who are the biological children of insured wage earners but who also must satisfy additional criteria. App., *infra*, 10a; see *Schafer*, 641 F.3d at 55 ("Congress would not have imposed an additional proof requirement on these undisputed children if undisputed biological parentage sufficed under [Section] 416(e)(1).").

The court of appeals' view that Section 416(h)(2)(A) has "no relevance" where a biological relationship is established, App., *infra*, 8a (quoting *Gillett-Netting*, 371 F.3d at 596), is further refuted by Section 416(h)(1)(A). That provision instructs the Commissioner to look to state law in all cases to determine whether a marriage was valid for purposes of deciding whether a surviving spouse is eligible for benefits. Thus, as the heading to Section 416(h) ("Determination of family status") makes clear, the tests in Section 416(h)(1)(A) and Section 416(h)(2)(A) are intended to be used in *all* cases to determine whether the requisite family status—"husband," "wife," or "child"—is established in the first place. The court of appeals erred in refusing to apply the plain terms of that provision.

2. The court of appeals' decision also reflects a basic misunderstanding of the background and legislative history of the current version of Sections 416(h)(2) and (3). The court relied on the reasoning of *Gillett-Netting*, in which the Ninth Circuit stated that language in Sections 416(h)(2) and (3) was "added to the Act to provide various ways in which children could be entitled to benefits even if their parents were not married or their parentage was in dispute." 371 F.3d at 596. The Ninth Circuit's view of the 1965 amendments was inaccurate, and

in any event, its conclusion that those amendments have "no relevance" to children whose parents were married or whose biological parentage is not in dispute, *ibid.*, does not follow.

As enacted in 1939, the child survivor provisions of the Social Security Act were similar in structure to the current law. They contained a provision granting benefits to every "child," see 42 U.S.C. 402(c)(1) (1940), a provision paralleling the current definition of "child," see 42 U.S.C. 409(k) (1940) ("The term 'child' * * * means the child of an individual."), and a provision paralleling the current versions of Sections 416(h)(1)(A) and (2)(A). See 42 U.S.C. 409(m) (1940) ("In determining whether an applicant is the wife, widow, child, or parent of a fully insured or currently insured individual, * * * the Board shall apply such law as would be applied in determining the devolution of intestate personal property."). Under those provisions, the only way *any* child (or wife, widow, or parent) could be eligible for benefits was by establishing that he or she would have been able to inherit under state intestacy law.

In 1965, Congress amended the Act to broaden eligibility for child survivor benefits. See Old-Age, Survivors, and Disability Insurance Amendments of 1965, Pub. L. No. 89-97, Tit. III, § 339, 79 Stat. 409. The Senate Report accompanying those amendments made clear Congress's understanding that "whether a child meets the definition of a child for the purpose of getting child's insurance benefits based on his father's earnings depends on the laws applied in determining the devolution of intestate personal property in the State in which the worker is domiciled." S. Rep. No. 404, 89th Cong., 1st Sess. Pt. I, at 109 (1965) (*Senate Report*); see *Schafer*, 641 F.3d at 57 (citing pre-1965 cases holding "that all

those claiming child status had to prove the ability to inherit under state law"). The Committee went on to observe that "States differ considerably in the requirements that must be met in order for a child born out of wedlock to have inheritance rights." *Senate Report* 109. In that context, some States prohibited intestate succession altogether, while others were more generous. *Id.* at 109-110. In order to provide greater uniformity, the Committee explained, the amendments provided for the eligibility of children who could not inherit under state law, "if the father had acknowledged the child in writing, had been ordered by a court to contribute to the child's support, had been judicially decreed to be the child's father, or is shown by other evidence satisfactory to the Secretary of Health, Education, and Welfare to be the child's father and was living with or contributing to the support of the child." *Ibid.* Those amendments are now codified in Section 416(h)(3)(C).

The history of the 1965 amendments demonstrates that Congress understood—and agreed with—the proposition that under the pre-1965 version of the Act, children who could not inherit under applicable state intestacy law were ineligible for survivor benefits. In amending Section 416(h) to broaden eligibility for benefits, Congress did not alter the role of Section 416(h) as the provision that governs the determination of family status for every benefits application; instead, it added alternative mechanisms to Section 416(h) under which a child who could not inherit under state intestacy law may nonetheless establish the requisite child-parent relationship. As the Fourth Circuit correctly concluded, "[t]he Act's legislative history could hardly be clearer" in establishing that "Congress understood the Act's framework as requiring all natural children to pass

through [Section] 416(h) to claim child status." *Schafer*, 641 F.3d at 58.

3. The court of appeals' interpretation also disregards the purposes of Section 416(h). Even in the context of federal programs, child-parent relationships are generally determined by state law. See *Mansell* v. *Mansell*, 490 U.S. 581, 587 (1989) ("Because domestic relations are preeminently matters of state law, we have consistently recognized that Congress, when it passes general legislation, rarely intends to displace state authority in this area."); see also *United States* v. *Morrison*, 529 U.S. 598, 615 (2000) (identifying "family law" as a field of "traditional state regulation"); *Schafer*, 641 F.3d at 62 ("Congress's efforts toward cooperative federalism here are hardly surprising. Family and inheritance law fall squarely within the states' historic competence."). As this Court has explained, "[t]he word 'children,' although it to some extent describes a purely physical relationship, also describes a legal status," which "requires a reference to the law of the State which create[s] those legal relationships." *De Sylva* v. *Ballentine*, 351 U.S. 570, 580 (1956).

Section 416(h)(2)(A)'s incorporation of state intestacy law rests not only on principles of federalism but also on the reality that, because survivor benefits are designed to provide support to survivors from the insured's Social Security wage account, state intestate-succession laws provide a sound guide in determining eligibility. As a general matter, "where state intestacy law provides that a child may take personal property from a [parent's] estate, it may reasonably be thought that the child will more likely be dependent during the parent's life and at his death." *Mathews* v. *Lucas*, 427 U.S. 495, 514 (1976). By contrast, categorically extending benefits to children

who were conceived only after the death of a parent would ill-serve "the Act's basic aim of primarily helping those children who lost support after the unanticipated death of a parent." *Schafer*, 641 F.3d at 58.

Indeed, in holding that the biological relationship between a posthumously conceived child and the deceased biological parent is sufficient, by itself, to establish a legal child-parent relationship for benefits purposes, the court of appeals adopted a rule that is broader than that adopted by any State in legislation directly addressing the question of posthumous conception. See, *e.g.*, Ala. Code § 26-17-707 (LexisNexis 2009); Cal. Prob. Code § 249.5 (West Supp. 2011); Colo. Rev. Stat. § 19-4-106(8) (2010); Del. Code Ann. tit. 13, § 8-707 (2009); Fla. Stat. Ann. § 742.17(4) (West 2010); La. Rev. Stat. Ann. § 9:391.1 (West 2008); N.M. Stat. § 40-11A-707 (Supp. 2010); N.D. Cent. Code § 14-20-65 (2009); Tex. Fam. Code Ann. § 160.707 (Vernon 2008); Utah Code Ann. § 78B-15-707 (2008); Va. Code Ann. § 20-158 (2008); Wash. Rev. Code Ann. § 26.26.730 (West 2005); Wyo. Stat. Ann. § 14-2-907 (2009) (all either excluding posthumously conceived children from intestate succession, or limiting the inheritance rights of such children to situations in which the deceased parent consented in a record to posthumous conception); see Uniform Parentage Act § 707, 9B U.L.A. 73 (Supp. 2011) (as amended in 2002) (a deceased individual is not a "parent" of a posthumously conceived child unless the individual "consented in a record that if assisted reproduction were to occur after death, the deceased individual would be a parent of a child"). If Congress wishes to adopt a broad rule like that announced by the Third and Ninth Circuits as a matter of federal law, it has the authority to do so. But in light of the many complexities

arising from rapid technological change in this area, Congress has chosen, so far, to leave the matter to the States. There is no basis for judicial creation of a federal rule that amends the statutory framework of the Social Security Act.

4. Even if the Act were susceptible to the interpretation adopted by the court of appeals, the court erred in disregarding the SSA's contrary interpretation of the statute, which is reasonable and entitled to deference.

The agency's longstanding position has been that the definition of "child" in Section 416(h) governs the meaning of "child" in Section 416(e)(1) and thus Section 402(d)(1). See 20 C.F.R. 404.355(a). Indeed, the agency's regulations articulating that interpretation date back to 1940, the year after Congress first added child survivor benefits to the Act. See 20 C.F.R. 403.832(a) (Supp. 1940) ("A son or daughter (by blood) of a wage earner, who is the child of such wage earner or has the same status as a child, *under applicable State law*, is the 'child' of such wage earner.") (citation omitted, emphasis added); accord 20 C.F.R. 404.1101 (Supp. 1952) (24 Fed. Reg. 13,077 (1951)); 20 C.F.R. 404.1109 (Supp. 1960). Significantly, that interpretation was well settled in 1965 when Congress amended Section 416(h), but Congress did nothing to disturb it. See *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change."). The agency's consistent interpretation of the statute, as set out in its published regulations, is entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). See *Barnhart* v. *Walton*, 535 U.S. 212, 217-222, 225 (2002)

(deferring to the Commissioner's "considerable authority" to interpret the Social Security Act).

In addition, the agency has addressed the specific question presented here in its Program Operations Manual System (POMS), stating that "[a] child conceived by artificial means after the [insured's] death cannot be entitled [to benefits] under the Federal law provisions of the Act (section 216(h)(3))," and that "[s]uch a child can only be entitled if he or she has inheritance rights under applicable State intestacy law." SSA, POMS GN 00306.001(C)(1)(c), https://policy.ssa.gov/poms.nsf/lnx/0200306001. To the extent that the POMS provision reflects an interpretation of the statute, it is entitled at least to deference under *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 139-140 (1944). See *Washington State Dep't of Soc. & Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U.S. 371, 385-386 (2003). To the extent it reflects an interpretation of the SSA's own regulations, it is entitled to even greater deference under *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997). The court of appeals identified no basis for setting aside the agency's considered view.

B. The Decision Below Contributes To A Circuit Conflict On An Important Question Warranting This Court's Review

The decision below is in accord with the Ninth Circuit's decision in *Gillett-Netting*, but it is in direct conflict with the Fourth Circuit's decision in *Schafer*. See *Schafer*, 641 F.3d at 55 (describing the interpretation of Section 416 adopted by the Third and Ninth Circuits as "craft[ed] from whole cloth," and concluding that it "cannot be right"). On August 1, 2011, the Fourth Circuit denied a petition for rehearing en banc in *Schafer*,

making it unlikely that the circuit conflict could be resolved without intervention from this Court.*

In addition, the reasoning of the court below is incompatible with that of the Fifth Circuit in *Conlon*. The claimant in that case argued that her daughter was the deceased wage earner's "child" under Section 416(e)(1) and therefore did not need to satisfy any of the criteria in Sections 416(h)(2) and (3) in order to obtain benefits. The court rejected that argument, explaining that "Section 416(e)(1) is * * * modified by sections 416(h)(2) and (3) which provide the final words on who is to be considered a child for purposes of section 416(e)(1)." *Conlon*, 719 F.2d at 800. The Fifth Circuit concluded that because the claimant's daughter "does not fit within the definition of a 'child' under either section 416(h)(2)(A) or section 416(h)(3)(C)(i)(II), she would not be considered a child under section 416(e)." *Ibid.* The Fifth Circuit thus has squarely rejected the reading of Section 416(e) adopted by the Third Circuit in this case. Accordingly, there is little doubt that, were it confronted with that question of statutory interpretation in the precise context of a posthumously conceived child, the Fifth Circuit would disagree with the decision below.

The decision below is also in tension with decisions of the District of Columbia and Sixth Circuits, in which those courts have addressed the role of Section 416(h) in the statutory scheme. In *Javier*, the District of Columbia Circuit held that an applicant who had been proved not to be the biological child of a wage earner was nevertheless entitled to benefits because, under the circumstances of the case, the law of the wage earner's domicile

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* The same issue is currently pending in the Eighth Circuit in *Beeler* v. *Astrue*, No. 10-1092 (argued Dec. 17, 2010).

did not permit a challenge to the child's parentage. 407 F.3d at 1246-1248. In reaching that conclusion, the court correctly recognized that, "[t]o determine whether an applicant meets the Act's definition of 'child'" as set out in Section 416(e), "the SSA must: 'apply such law as would be applied in determining the devolution of intestate personal property,'" as required by Section 416(h). *Id.* at 1247 (quoting 42 U.S.C. 416(h)(2)(A)). In *DeSonier*, there was no dispute that the applicant was the biological child of a deceased wage earner, but the Sixth Circuit correctly recognized "that a claimant's relationship to a deceased wage earner is determined by applying the laws of the state in which the worker was domiciled at the time of his death," 906 F.2d at 229, and it therefore conducted an extensive analysis of state law in order to determine the applicant's eligibility, *id.* at 234-235. The approach taken by the court in this case cannot be reconciled with those decisions.

The question of statutory interpretation at issue in this case is of recurring significance in the administration of the Social Security system. SSA has acquiesced in *Gillett-Netting* only for cases arising in the Ninth Circuit, so it now applies a different rule there than in the rest of the country. See 70 Fed. Reg. 55,656 (2005). This Office has been informed by SSA that it has received more than 100 applications for survivor benefits by posthumously conceived children, and that the rate of such applications has increased significantly in recent years. Indeed, several cases are currently pending in district courts around the country. See, *e.g.*, *Bosco* v. *Commissioner of Social Security*, No. 10-07544 (S.D.N.Y.); *Amen* v. *Astrue*, No. 4:10-cv-3216 (D. Neb.); *Burns* v. *Astrue*, No. 2:09-cv-926 (D. Utah); see also *Beeler* v. *Astrue*, No. 1:09-cv-0019 (N.D. Iowa Nov. 12,

2009), appeal pending, No. 10-1092 (8th Cir. argued Dec. 17, 2010). More broadly, the decision below disregards a 70-year-old regulatory framework that applies to all applications for child survivor benefits.

Because the decision below conflicts with decisions of other courts of appeals, is incorrect, and presents an important and recurring question, this Court's review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 2011

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 10–2027

KAREN K. CAPATO, O/B/O B.N.C., K.N.C., APPELLANT

v.

COMMISSIONER OF SOCIAL SECURITY

Argued: Nov. 15, 2010
Opinion Filed: Jan. 4, 2011

OPINION OF THE COURT

Before: BARRY, CHAGARES and VANASKIE, Circuit Judges.

BARRY, Circuit Judge.

This case—a case that involves the rights of the posthumously conceived children of a deceased wage earner and his widow—requires us to consider the intersection of new reproductive technologies and what is required to qualify for child survivor benefits under the Social Security Act (the "Act"). It goes without saying that these technologies were not within the imagination, much less the contemplation, of Congress when the relevant sections of the Act came to be, and that they present a host of difficult legal and even moral questions.

We need not reach those difficult questions given the discrete factual circumstances of this case. We, nonetheless, cannot help but observe that this is, indeed, a new world.

I. *Background*

A. *Factual History*

Robert Capato was born in the State of Washington in 1957 and, aside from a ten-year period when he resided in California, lived in Washington until the 1990s. Mr. Capato met his future wife, Karen, in Washington and subsequently moved with her to Colorado, where they lived for two years. In early 1999, the couple moved to Florida for Mr. Capato's business, and lived in Florida for approximately three years. At some point while in Florida, they decided to move to New Jersey and took some steps in that regard, but did not leave Florida prior to Mr. Capato's death.

In August 1999, shortly after the Capatos' wedding in New Jersey, Mr. Capato was diagnosed with esophageal cancer, and was told that the chemotherapy he required might render him sterile. The Capatos, however, wanted children, and thus, before he began his course of chemotherapy, Mr. Capato deposited his semen in a sperm bank, where it was frozen and stored. Somewhat surprisingly, given the treatment that Mr. Capato was by then undergoing, Ms. Capato conceived naturally and gave birth to a son in August 2001. The Capatos, however, wanted their son to have a sibling.

Mr. Capato's health deteriorated in 2001, and he died in Florida in March of 2002. His death certificate listed his residence as Pompano Beach, Florida. Three months

before his death, he executed a will in Florida naming as his beneficiaries the son born of his marriage to Ms. Capato and two children from a prior marriage. Although Ms. Capato claims that she and her husband spoke to their attorney about including "unborn children" in the will, "so that it would be understood that . . . they'd have the rights and be supported in the same way that [their natural born son] was already privileged to," App. at 288, the will did not contain any such provision.

Shortly after Mr. Capato's death, Ms. Capato began in vitro fertilization using the frozen sperm of her husband. She conceived in January 2003 and gave birth to twins on September 23, 2003, eighteen months after Mr. Capato's death.

B. *Procedural History*

In October 2003, Ms. Capato applied for surviving child's insurance benefits on behalf of the twins based on her husband's earnings record. The Social Security Administration denied her claim, and Ms. Capato timely requested a hearing before an administrative law judge ("ALJ"). A hearing was held on May 30, 2007, with testimony taken from Ms. Capato and two friends. On November 28, 2007, the ALJ rendered his decision denying Ms. Capato's claim. Observing that "[t]his is a case where medical-scientific technology has advanced faster than the regulatory process," *id.* at 6, and that this is a "very sympathetic case" in which "allowing benefits would appear to be consistent with the purposes of the Social Security Act," the ALJ nonetheless believed himself "constrained by applicable laws and regulations to find disentitlement." *Id.* at 7. Finding that the twins,

conceived after the death of their father, "are not for Social Security purposes the 'child(ren)' of the deceased wage earner, Robert Capato, under Florida state law as required by section 216(h)(2)(A) of the Social Security Act," the ALJ concluded that they were not entitled to child's insurance benefits in accordance with sections 202(d)(1) and 216(e) of the Act and the relevant regulations. *Id.* at 8. The District Court affirmed, echoing the ALJ's interpretation of the Act and his conclusion that Mr. Capato was domiciled in Florida on the date of his death and, thus, that Florida's law of intestacy should be applied. This timely appeal, over which we have jurisdiction pursuant to 28 U.S.C. § 1291, followed. We will affirm in part and vacate in part, and remand for further proceedings.[1]

II. *Discussion*

A. *Standard of Review*

We review *de novo* the District Court's decision to uphold the denial of benefits. *Boone v. Barnhart*, 353 F.3d 203, 205 (3d Cir. 2003). We review the ALJ's deci-

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[1] We will affirm the dismissal of Ms. Capato's Equal Protection claim. As the Ninth Circuit found in a similar challenge, "the [Social Security Administration] is not excluding all posthumously-conceived children, only those that do not meet the statutory requirements under State law." *Vernoff v. Astrue*, 568 F.3d 1102, 1112 (9th Cir. 2009). Such a classification does not violate Equal Protection laws because it is reasonably related to the government's interest in assuring that survivor benefits reach children who depended on the support of a wage-earner and lost that support due to the wage-earner's death. *See id.* ("[T]he challenged classifications are reasonably related to the government's twin interest in limiting benefits to those children who have lost a parent's support, and in using reasonable presumptions to minimize the administrative burden of proving dependency on a case-by-case basis.").

sion to assure that it was supported "by substantial evidence in the record." *Adorno v. Shalala*, 40 F.3d 43, 46 (3d Cir. 1994) (internal quotation marks and citation omitted). "Sustantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate." *Ventura v. Shalala*, 55 F.3d 900, 901 (3d Cir. 1995) (internal quotation marks and citation omitted). "Where the ALJ's finding of fact are supported by substantial evidence, we are bound by those findings, even if we would have decided the factual inquiry differently." *Fargnoli v. Massanari*, 247 F.3d 34, 38 (3d Cir. 2001).

B. *Entitlement to Child's Insurance Benefits*

Title II of the Social Security Act, codified at 42 U.S.C. § 401 *et seq.*, allows certain categories of children to receive a survivor's benefit following the death of a "fully or currently insured individual." 42 U.S.C. § 402(d)(1). The purpose of "federal child insurance benefits" is not to provide general welfare benefits, but to "replace the support that the child would have received from his father had the father not died." *Jones ex rel. Jones v. Chater*, 101 F.3d 509, 514 (7th Cir. 1996) (citing *Mathews v. Lucas*, 427 U.S. 495, 507–08, 96 S. Ct. 2755, 49 L. Ed. 2d 651 (1976)); *see also Adams v. Weinberger*, 521 F.2d 656, 659 (2d Cir. 1975) (the purpose of the Act is to provide support to children who have lost "actual" or "anticipated" support). In general, "the [Act] is to be accorded a liberal application in consonance with its remedial and humanitarian aims." *Eisenhauer v. Mathews*, 535 F.2d 681 (2d Cir. 1976).

To qualify for child's insurance benefits, the applicant must be the "child," as defined in § 416(e) of the

Act, of an individual entitled to benefits or who is fully or currently insured. 42 U.S.C. § 402(d)(1). Section 416(e) defines "child" broadly as, in relevant part, "the child or legally adopted child of an individual." *Id.* § 416(e)(1). Additionally, and as relevant here, the "child" (a) must have filed an application for benefits, (b) must be unmarried and less than eighteen years old (or an elementary or secondary school student under nineteen), and (c) must have been dependent upon the deceased individual at the time of his or her death. *Id.* § 402(d)(1)(A)–(C). "Every child (as defined in section 416(e) of this title)" will qualify, assuming, of course, that the other requisites have been met. *Id.* § 402(d)(1).

Section 416(h), entitled "Determination of family status," offers other ways by which to determine whether an applicant is a "child":

> In determining whether an applicant is the child or parent of a fully or currently insured individual for purposes of this subchapter, the Commissioner of Social Security shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which such insured individual is domiciled at the time such applicant files application or, if such insured individual is dead, by the courts of the State in which he was domiciled at the time of his death.

Id. § 416(h)(2)(A).

Moreover, if an applicant is unable to inherit from the deceased wage earner under state intestacy law, the Act provides three alternative mechanisms by which to deem the applicant a "child" for purposes of survivor benefits. These alternatives are, on their face, inapplica-

ble here and are set forth only for completeness. First, the applicant is deemed to be the "child" of the insured individual if the applicant is the son or daughter and the covered parent went through a marriage ceremony that would have been valid but for a legal impediment. *Id.* § 416(h)(2)(B). Second, the applicant is deemed to be the "child" where the in either (a) acknowledged in writing that the applicant was his or her child; (b) was decreed by a court to be the mother or father of the applicant; or (c) was ordered by a court to pay child support. *Id.* § 416(h)(3)(C)(i). Third, the applicant is deemed to be the "child" where the deceased individual is shown to be the mother or father, and the deceased individual was living with or contributing to the child's support at the time of death. *Id.* § 416(h)(3)(C)(ii).

Thus, "child" is defined in different subsections of the Act—§ 416(e) and again in §§ 416(h)(2)(A), 416(h)(2)(B), and 416(h)(3). Were we to determine that the § 416(h)(2)(A) definition of "child" is appropriate here and go on to apply the law of intestacy of Florida, as the Commissioner argues we should, we would affirm. But neither the Commissioner nor the District Court, who agreed with the Commissioner, has told us why, in the factual circumstances of this case, where there is no family status to determine, we would even *refer* to § 416(h). Under § 402(d), the child is a "child" as defined in § 416(e). To accept the argument of the Commissioner, one would have to ignore the plain language of § 416(e) and find that the biological child of a married couple is not a "child" within the meaning of § 402(d) unless that child can inherit under the intestacy laws of the domicile of the decedent. There is no reason appar-

ent to us why that should be so, and we join the Ninth Circuit in so concluding.

In *Gillett–Netting v. Barnhart*, 371 F.3d 593 (9th Cir. 2004), a case factually identical to the case before us,[2] the Ninth Circuit explained that §§ 416(h)(2) and (3) "were added to the Act to provide various ways in which children could be entitled to benefits even if their parents were not married or their parentage was in dispute," and have "no relevance" for determining whether a claimant is the "child" of a deceased wage earner where parentage is not in dispute. 371 F.3d at 596. The Commissioner conceded that Mr. Netting's children were his biological children, *id.*, at 597, as here the Commissioner concedes that Mr. Capato's children are his. The Ninth Circuit found that the district court erred when it concluded that Mr. Netting's children were not "children" for purposes of the Act.[3]

In response to *Gillett–Netting*, the Commissioner issued an "Acquiescence Ruling," effective September 22, 2005.[4] *See* Social Security Acquiescence Ruling

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[2] The husband was diagnosed with cancer, was advised that chemotherapy might render him sterile, and his semen was frozen and stored in hopes that, even after he died, his wife would have his children. His wife conceived by means of in vitro fertilization and gave birth to twins eighteen months after his death.

[3] Because, in the case before us, the District Court did not reach the issue of dependency given its conclusion that the definition of "child" was not satisfied, we, therefore, need not address the Ninth Circuit's conclusion that Mr. Netting's children were "conclusively deemed dependent on [him] under the Act" and why that was thought to be so. 371 F.3d at 599.

[4] "An acquiescence ruling explains how we will apply a holding in a decision of a United States Court of Appeals that we determine conflicts with our interpretation of a provision of the Social Security Act (Act) or

05–1(9), 70 Fed. Reg. 55,656 (Sept. 22, 2005). The Acquiescence Ruling limited the application of *Gillett–Netting* to claims within the Ninth Circuit. *Id.* at 55,657. It also contained a "Statement as to How *Gillett–Netting* Differs From SSA's Interpretation of the Social Security Act." *Id.* In that Statement, the Commissioner hewed to the arguments she had made to the Ninth Circuit: in all cases, § 416(h) "provides the analytical framework that we must follow for determining whether a child is the insured's child for the purposes of section [416(e)]," and § 416(h)(2)(A) directs the application of state intestacy law or the alternative mechanisms in §§ 416(h)(2)(B) and 416(h)(3)(C) to determine whether a child is a "child." *Id.* An "after-conceived" child, she continued, cannot satisfy the alternative mechanisms in §§ 416(h)(2)(B) and 416(h)(3)(C), and "[c]onsequently, to meet the definition of 'child' under the Act, an after-conceived child must be able to inherit under State law." *Id.* There was no explanation as to why the statute even suggests, much less compels, that result.

The Commissioner has attempted to explain to us why the Ninth Circuit's analysis of the Act's legislative history was "indisputably mistaken." The explanation goes as follows: "When child survivor benefits were established in 1939, section 416(h)(2)(A) was the only way any child could be eligible for benefits." Appellee's Br. at 34. Because no effective means existed at that time to scientifically prove a child-parent relationship, Congress determined that the primary way to prove child status

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regulations when the Government has decided not to seek further review of that decision or is unsuccessful on further review." *See* Social Security Acquiescence Ruling 05–1(9), 70 Fed. Reg. 55,656 (Sept. 22, 2005).

should be eligibility to inherit under state law. *Id.* Given that state laws would have provided for inheritance by the child of a marriage, that child would have no problem qualifying as the wage-earner's "child" for survivor benefits under the Act. The Commissioner argues that even though Congress added § 416(h)(3) in 1965 to provide additional ways by which a child could prove "child" status, "that addition did nothing to change the exising requirement that all children, even including children of married parents whose parentage was not in dispute, satisfy at least one of the provisions of section 416(h)." *Id.* at 35.

The explanation ignores the fundamental question: why should we, much less why *must* we, refer to § 416(h) when § 416(e) is so clear, and where we have before us the undisputed biological children of a deceased wage earner and his widow. The plain language of § 402(d) and 416(e) provides a threshold basis for defining benefit eligibility. The provisions of § 416(h) then provide for "[d]etermination of family status"—subsection (h)'s heading—to determine eligibility where a claimant's status as a deceased wage-earner's child is in doubt. Were it the case that such status had to be determined here, we would turn to the relevant provisions of § 416(h). But a basic tenet of statutory construction is that "[i]n the absence of an indication to the contrary, words in a statute are assumed to bear their 'ordinary, contemporary, common meaning.'" *Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202, 207, 117 S. Ct. 660, 136 L. Ed. 2d 644 (1997) (quoting *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 388, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993)). The term "child" in § 416(e) requires no further definition when all par-

ties agree that the applicants here are the biological offspring of the Capatos. Stated somewhat differently, we do not read §§ 402(d) or 416(e) as requiring reference to 416(h) to establish child status under the facts of this case. Our analysis does not render § 416(h) superfluous but, rather, places it in context with § 416(e) and the clear command of § 402(d)(1) to refer to § 416(e) to define the word "child."[5]

We acknowledge that another factual scenario might render the Commissioner's concerns more persuasive. Those concerns must, however, await another case, though we note them ourselves with some concern:

> [A]lthough biological paternity can now be scientifically proven to a near certain degree of probability, modern artificial reproduction technologies currently allow for variations in the creation of child-parent relationships which are not solely dependent upon biology. The use of donor eggs, artificial insemination, and surrogate wombs could result in at least five potential parents. Accordingly, even in modern times, the basic assumption underlying the *Gillett–Netting* panel's reasoning—*i.e.*, that biological paternity always results in an 'undisputed' child-parent relationship—is unfounded.

Appellee's Br. at 36 (internal citation omitted).

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[5] Because we can resolve this issue based on our analysis of Congress' "unambiguously expressed intent" in the statutory language, we need not determine whether the Commissioner's interpretation is a permissible construction of the statute. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984).

To be sure, as the Ninth Circuit put it, "[d]eveloping reproductive technology has outpaced federal and state laws, which currently do not address directly the legal issues created by posthumous conception." *Gillett-Netting*, 371 F.3d at 595. As we have noted, the more difficult of those legal issues are not before us. What *is* before us is a discrete set of circumstances and the narrow question posed by those circumstances: are the undisputed biological children of a deceased wage earner and his widow "children" within the meaning of the Act? The answer is a resounding "Yes." Accordingly, we will vacate the order of the District Court in part and remand for a determination of whether, as of the date of Mr. Capato's death, his children were dependent or deemed dependent on him, the final requisite of the Act remaining to be satisfied.[6]

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[6] Given this disposition, it is not necessary for us to determine where Mr. Capato was domiciled at his death or to delve into the law of intestacy of that state. We note, however, that were we to decide the issue of domicile, we would likely conclude that it was Florida.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 10-2027

KAREN K. CAPATO, O/B/O B.N.C., K.N.C., APPELLANT

v.

COMMISSIONER OF SOCIAL SECURITY

Mar. 9, 2011

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
(D.C. Civil No. 08-cv-05405)

SUR PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

District Judge: HONORABLE DENNIS M. CAVANAUGH.

Present: MCKEE, *Chief Judge*, SLOVITER, SCIRICA, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., and VANASKIE, *Circuit Judges*.

The petition for rehearing en banc filed by Appellee having been submitted to the judges who participated in the decision of this Court, and to all the other available

circuit judges in active service, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing *en banc* is DENIED.

BY THE COURT:

/s/ MARYANNE TRUMP BARRY
MARYANNE TRUMP BARRY
Circuit Judge

Dated: Mar. 9, 2011

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No.: 08-5405 (DMC)

KAREN K. CAPATO O/B/O B.N.C. K.N.C., PLAINTIFF

v.

MICHAEL J. ASTRUE, COMMISSIONER OF SOCIAL SECURITY, DEFENDANT

Filed: Mar. 23, 2010

OPINION

Hon. DENNIS M. CAVANAUGH:

This matter comes before the Court upon Karen Capato's ("Plaintiff") appeal from the Commissioner of Social Security's ("Commissioner") final decision denying Plaintiff's request for child's insurance benefits on the account of deceased wage earner Robert Nicholas Capato (the "decedent") under the Social Security Act (the "Act"). No oral argument was heard pursuant to Rule 78 of the Federal Rules of Civil Procedure. For the reasons set forth below, the final decision of the Commissioner is affirmed.

I. BACKGROUND[7]

A. Procedural Background

On October 31, 2003, Plaintiff applied for child's insurance benefits on behalf of the minor children on the account of deceased number holder Robert Nicholas Capato. (Transcript "Tr." 31-33). Plaintiff's application was denied. Plaintiff filed a request for reconsideration, and, again, these claims were denied. (Tr. 194-95, 206-12). On May 11, 2006, Plaintiff requested a hearing by an Administrative Law Judge ("ALJ"). (Tr. 213). On May 30, 2007, Plaintiff appeared with counsel before ALJ Joel Friedman. (Tr. 257-315). ALJ Friedman considered the evidence and testimony de novo and, on November 28, 2007, issued a decision denying the claims. (Tr. 11-21). On September 10, 2008, the Appeals Council denied Plaintiff's request for review. (Tr. 6-8). This action followed.

B. Factual Background

1. Testimonial Evidence

Decedent wage earner was born in Kent, Washington on May 1, 1957. (Tr. 235). Plaintiff testified that she and the decedent met in the mid-1990s in Seattle, Washington. (Tr. 281-82). They lived together in Florida, first in Tampa and later in Pompano Beach, and were married in New Jersey. (Tr. 282). The decedent started a chain of health clubs in Florida. (Tr. 286). Plaintiff further testified that their final destination was going to be New Jersey. (Tr. 287). In August 1999, the decedent was diagnosed with esophageal cancer. *Id.* Plaintiff

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[7] The facts set-forth in this Opinion are taken from the Parties' statements in their respective briefs.

testified that, immediately after the decedent's diagnosis, they decided to freeze his sperm because the chemotherapy used to treat the decedent's cancer could lead to infertility. (Tr. 283-84). Plaintiff testified that, in August 2001, she and the decedent had their first child together; this child, D.C., was conceived through natural means. (Tr. 284). Plaintiff further testified that, shortly before the birth of D.C., she and the decedent decided to move to New Jersey to try to open businesses there. (Tr. 285). It was at this time that Plaintiff and the decedent had conversations about where they would live in New Jersey (Tr. 285-86). Plaintiff testified that the decedent executed his last will and testament and that the decedent talked with an attorney about including unborn children in the will. (Tr. 288). Plaintiff testified that the decedent attempted to incorporate a business in New Jersey to start opening health clubs there so that, ultimately, the family could move there. (Tr. 291).

Testifying on Plaintiffs behalf was Michelle Ann Cappola ("Ms. Cappola"). (Tr. 267-72). Ms. Cappola testified that she had known Plaintiff for 30 years, first becoming friends in high school. (Tr. 267). She testified that she had met the decedent, who had indicated to her in an undated conversation that he wanted a sibling for his child D.C. (Tr. 268). Ms. Cappola also testified that she was employed part-time as a realtor and had conversed with the decedent about business locations in the State of New Jersey. (Tr. 269). She stated that, as far as she knew, the decedent also wanted to move his residence to New Jersey. *Id.* Also testifying on Plaintiffs behalf was Jan Cooper ("Ms. Cooper"). (Tr. 272-78). Ms. Cooper testified that she had known Plaintiff for 15 years through work. (Tr. 273). Ms. Cooper testified that, when Plaintiff and the decedent were living in

Florida, they had talked with her after the birth of their child D.C. about moving to New Jersey. (Tr. 275). She testified that, at Thanksgiving in 2001, the decedent told her that he had been preserving sperm so that D.C. would not be an only child (Tr. 276).

2. Documentary Evidence

Plaintiff and the decedent were married in Weehawken, New Jersey, on May 15, 1999. (Tr. 236). The decedent was diagnosed in 1999 with esophageal carcinoma. (see Tr. 245). In April 2000, Plaintiff and the decedent began a program of preserving sperm for in vitro fertilization at the Northwest Center for Infertility and Reproductive Endocrinology in Florida. (Tr. 76-95). On December 7, 2000, Dr. Howard Adler ("Dr. Adler") of the Center for Hematology-Oncology evaluated the decedent's cancer (Tr. 245-47). Dr. Adler noted that Plaintiff was diagnosed with esophageal carcinoma and was receiving radiation treatment and chemotherapy (Tr. 245). Dr. Adler continued the decedent on these treatments, with medicine to help his appetite (Tr. 246-47). On April 11, 2001, Dr. Adler opined that the decedent was doing quite well and indicated that the decedent was receiving aggressive treatment (Tr. 244). However, by November 2001, Dr. Adler noted that, after a period of doing quite well, the decedent had a recurrence of the disease and his prognosis was poor (Tr. 242).

On December 12, 2001, the decedent executed his last will and testament under Florida law. (Tr. 161-89). This will disposes of the decedent's tangible personal property to Plaintiff, if she survives him, and then to any of his children who survive him (Tr. 161). The residuary

estate was distributed to two children from a previous marriage and to Plaintiff, with a provision for the decedent's child D.C., if Plaintiff did not survive him (Tr. 162). If neither Plaintiff nor D.C. survived him, then decedent's residuary estate was to be distributed in accordance with the intestacy laws of Florida, with the decedent's heirs to be determined at the time of his death. *Id.* The will provides for administration of a marital trust, a family trust, and a trust for D.C. (Tr. 163-65).

On March 23, 2002, the decedent died of metastatic esophageal cancer. (Tr. 235). At the time of his death, the decedent resided in Pompano Beach, Florida. *Id.* Shortly thereafter, Plaintiff underwent artificial insemination treatments in Florida. (Tr. 96-102). Plaintiff later received artificial insemination treatments at Reproductive Medicine Associates of New Jersey ("RMA") starting in November 2002. (Tr. 103-34). On September 23, 2003, Plaintiff gave birth to twins, the minor children. (Tr. 237-38). Dr. Richard Scott ("Dr. Scott") of RMA wrote a letter dated December 1, 2003, indicating that the minor children were conceived in January 2003 from the decedent's sperm. (Tr. 136).

II. STANDARD OF REVIEW

The Court's review is limited to determining whether the Commissioner's decision is based upon the correct legal standards and is supported by substantial evidence in the record as a whole. *See* 42 U.S.C. § 405 (g); *see also Richardson v. Perales*, 402 U.S. 389, 390 (1971). A reviewing court must uphold the Commissioner's factual decisions if they are supported by "substantial evidence." 42 U.S.C. §§ 405(g), 1383(c)(3); *Williams v. Sullivan*, 970 F.2d 1178, 1182 (3d Cir. 1992), *cert. denied*

sub nom., *Williams v. Shalala*, 507 U.S. 924 (1993). Substantial evidence is defined as that quantum of evidence which a "reasonable mind might accept as adequate to support a conclusion." *Perales*, 204 U.S. at 401 (quoting *Consolidated Edison Co. v. N.L.R.B.*, 305 U.S. 197, 229 (1938)). If there is substantial evidence in the record to support the Commissioner's factual findings, they are conclusive and must be upheld. 42 U.S.C. § 405(g). "Substantial evidence" means more than "a mere scintilla." *Richardson v. Perales*, 402 U.S. 389,401 (1971) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

> Some types of evidence will not be "substantial." For example, [a] single piece of evidence will not satisfy the substantiality test if the [Commissioner] ignores, or fails to resolve, a conflict created by countervailing evidence. Nor is evidence substantial if it is overwhelmed by other evidence—particularly certain types of evidence (e.g. that offered by treating physicians)—or if it really constitutes not evidence but mere conclusion.

Wallace v. Sec'y of Health & Human Servs., 722 F.2d 1150, 1153 (3d Cir. 1983) (quoting *Kent v. Schweiker*, 710 F.2d 110, 114 (3d Cir. 1983)). The ALJ must make specific findings offact to support the ALJ's ultimate conclusions. *Stewart v. Sec'y of HEW*, 714 F.2d 287, 290 (3d Cir. 1983). "Where the ALJ's findings of fact are supported by substantial evidence, the [reviewing court] is bound by these findings, even if [it] would have decided the factual inquiry differently." *Fargnoli v. Massanari*, 247 F.3d 34, 35 (3d Cir. 2001). Thus, substantial evidence maybe slightly less than a preponderance.

Stunkard v. Sec'y of Health & Human Servs., 841 F.2d 57, 59 (3d Cir. 1988).

"The reviewing court, however, does have a duty to review the evidence in its totality." *Schonewolf v. Callahan*, 972 F. Supp. 277, 284 (D. N.J. 1997) (citing *Daring v. Heckler*, 727 F.2d 64, 70 (3d Cir. 1984)). In order to review the evidence, "a court must 'take into account whatever in the record fairly detracts from its weight.'" *Id.* (quoting *Willibanks v. Sec'y of Health & Human Servs.*, 847 F.2d 301, 303 (6th Cir. 1988)). The Commissioner has a corresponding duty to facilitate the court's review: "[w]here the [Commissioner] is faced with conflicting evidence, he must adequately explain in the record his reasons for rejecting or discrediting competent evidence." *Ogden v. Bowen*, 677 F. Supp. 273, 278 (M.D. Pa. 1987) (citing *Brewster v. Heckler*, 786 F.2d 581 (3d Cir. 1986). As the Third Circuit has held, access to the Commissioner's reasoning is indeed essential to a meaningful court review:

> Unless the [Commissioner] has analyzed all evidence and has sufficiently explained the weight he has given to obviously probative exhibits, to say that his decision is supported by substantial evidence approaches an abdication of the court's duty to scrutinize the record as a whole to determine whether the conclusions reached are rational.

Gober v. Matthews, 574 F.2d 772, 776 (3d Cir. 1978) (quoting *Arnold v. Sec'y of HEW*, 567 F.2d 258, 259 (4th Cir. 1977).

"[The reviewing court] need[s] from the ALJ not only an expression of the evidence []he considered which supports the result, but also some indication of the evidence

which was rejected." *Cotter v. Harris*, 642 F.2d 700, 705 (3d Cir. 1981). Without such an indication by the ALJ, the reviewing court cannot conduct an accurate review of the matter; the court cannot determine whether the evidence was discredited or simply ignored. *See Burnett v. Comm'r of Soc. Sec.*, 220 F.3d 112, 121 (3d Cir. 2000) (citing *Cotter*, 642 F. 2d at 705); *Walton v. Halter*, 243 F.3d 703, 710 (3d Cir. 2001). "The district court . . . is [not] empowered to weigh the evidence or substitute its conclusions for those of the fact-finder." *Williams*, 970 F.2d at 1182 (citing *Early v. Heckler*, 743 F.2d 1002, 1007 (3d Cir. 1984)).

III. DISCUSSION

Before this Court is Plaintiff's appeal of the ALJ's decision finding that Plaintiff's minor children do not qualify as children of the decedent under the Social Security Act and thus are not entitled to child's insurance benefits. Plaintiff argues that the Commissioner's decision was not supported by substantial evidence; that the ALJ was biased and failed to heed the documentation presented and the testimony of the witnesses; that Plaintiff and decedent's minor children, the Capato twins' rights to equal protection under the Fifth Amendment have been violated; that the denial of benefits for the twins violates the Act's statutory scheme; and that the Commissioner's decision to issue an acquiescence ruling limiting application of *Gillet-Netting v. Barnhart*, 371 F.3d 593 (9th Cir. 2004) to the Ninth Circuit arbitrarily denies benefits to children outside of the Ninth Circuit. Finding that the ALJ properly evaluated the applicable law, and because the ALJ's and Commission-

er's decisions were supported by substantial evidence, this Court affirms the decision of the ALJ.

A. The Commissioner's Decision was Supported by Substantial Evidence

Substantial evidence supports a finding that the twins do not qualify as children of the decedent under the Act. There are two ways for minor children to qualify for dependent's benefits under the Act. The minor children of the decedent may establish their rights to inherit as the decedent's children under state intestacy laws pursuant to 42 U.S.C. Section 416(h)(2)(A) or through the alternative mechanisms under 42 U.S.C. Section 416(h)(2)(B), Section 416(h)(2)(C)(i) or Section 416(h)(2)(C)(ii).

1. The Twins Are Not "Children" Under the Social Security Act's Criteria

The Act includes both a definition of "child" and instructions on how the Commissioner should determine whether an applicant is a "child." Under 42 U.S.C. Section 416(e), "child" can mean "(1) the child or legally adopted child of an individual, (2) a stepchild . . . and (3) a person who is the grandchild or stepgrandchild. . . . " However, Congress's instructions for the primary method utilized by the Commissioner in determining parent-child relationships is provided under Section 416(h)(2)(a) of the Act, captioned "Determination of Family Status," which states:

> In determining whether an applicant is the child . . . of a fully or currently insured individual for purposes of this title, the Commissioner of Social Security shall apply such law as would be applied in de-

> termining the devolution of intestate personal property . . . by the Courts of the State in which [such insured individual] was domiciled at the time of his death . . . Applicants who according to such law would have the same status relative to taking intestate personal property as a child or parent shall be deemed such.

If an applicant does not qualify as a "child" under this provision, Congress provided three alternative mechanisms for establishing child status; however, each requires that the insured be living at the time of the child's conception. *See* 42 U.S.C. § 416(h)(2)(B) (applicant is deemed to be the "child" of the insured if the insured and other parent went through a marriage ceremony that would have been valid but for certain legal impediments); 42 U.S.C. § 416(h)(3)(C)(i) (applicant is deemed to be the "child" of the insured if the insured had acknowledged paternity in writing, or if a court decreed the insured to be the parent or ordered the insured to pay child support, and such acknowledgment, court decree, or court order was made *"before the death of the insured"* (emphasis added); and 42 U.S.C. § 416(h)(3)(C)(ii) (applicant is deemed the "child" if there is satisfactory evidence that the insured was the applicant's parent and the insured was living with or supporting the applicant at the time of death).

Substantial evidence supports the ALJ's finding that the insured was domiciled in the State of Florida at the time of death. The Capato twins are neither heirs under Florida's intestacy law nor beneficiaries of the decedent's will. Therefore, under Section 416(h)(2)(a), the twins are not entitled to Social Security benefits.

i. The Decedent was Domiciled in Florida

There is substantial evidence to support the ALJ's decision, in determining which state's intestacy laws to apply, that the decedent was domiciled in Florida at the time of his death. "[D]omicile is established by physical presence in a place in connection with a certain state of mind concerning one's intent to remain there." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48 (1989) (citing *Texas v. Florida*, 306 U.S. 398, 424 (1939).

Under *District of Columbia v. Murphy*, 314 U.S. 441, 455 (1941) residence alone is sufficient to raise a presumption of domicile. "The place where a man lives is properly taken to be his domicile until facts adduced establish the contrary." The decedent's residence was in Florida at the time of his death. (Tr. 235). Further, the decedent executed his last will and testament in the State of Florida, with all matters involving the validity and interpretation of the will governed by the laws of Florida. (Tr. 160-189). The residuary clause of the will stated that any residuary estate not distributed to those named in the will was to be distributed to the decedent's heirs at law determined at the time as if he had died unmarried and intestate under Florida law then in effect. (Tr. 162). Plaintiff testified that she and the decedent had plans to move to New Jersey, and that they looked at real estate in New Jersey, but these plans were vague and indefinite, therefore, the ALJ's finding that the decedent was not domiciled in New Jersey was supported by substantial evidence. "It is not important if there is within contemplation a vague possibility of eventually going elsewhere, or even of returning whence one came." *Gallagher v. Philadelphia Transp. Co.*, 185 F.2d 543, 545 (3d Cir. 1950); *see also Barrett v. Greater*

Hatboro Chamber of Commerce, Inc., 2005 U.S. Dist. LEXIS 18673, *10 (E.D. Pa. Aug. 19, 2005); *Murphy v. Miller*, 2005 U.S. Dist. LEXIS 1823, *3 (E.D. Pa. Feb. 8, 2005). At the time of his death in 2002, the decedent had lived in Florida for roughly three years, a period sufficient to acquire domicile in Florida. The Third Circuit Court of Appeals has stated that "[a]n individual can change domicile instantly." *McCann v. George W. Newman Irrevocable Trust*, 458 F.3d 281, 286 (3d Cir. 2006).

Plaintiff provided additional documentary evidence to this Court, not provided to the ALJ, in an attempt to persuade this Court that Florida was not the domicile of the decedent. This new evidence consists of papers of incorporation for NICAP Industries, Inc. ("NICAP") (Ex. 1), federal tax returns from the decedent and his corporation (Ex. 2), and a photocopy of the decedent's passport (Ex. 3). However, the Social Security Act only provides for review of the Commissioner's decision and the evidence upon which the findings and decision are based, unless the new evidence is material and good cause is shown for why the evidence was not incorporated into the original record. 42 U.S.C. § 405(g); *Szubak v. Sec'y of Health & Human Servs.*, 745 F.2d 831, 833 (3d Cir. 1984) (requiring a showing of good cause for not incorporating new evidence into the administrative record). Here, this new evidence was generated between 1998 and 2003 and was in Plaintiff s possession. Plaintiff has failed to show good cause as to why it was not presented to the ALJ or Appeals Council. Regardless, this evidence is not material and does not merit reversal of the ALJ's findings. The tax returns demonstrate that the decedent's corporation was incorporated in Washington, but are not evidence of fixed,

definite plans to leave Florida. (Ex. 1). While the decedent listed a Washington address as the registered agent, Washington law requires such an address within the state for service of process. *See* Rev. Code Wash. Ann. § 23B.05.010. Tellingly, correspondence between the Internal Revenue Service and Plaintiff in her capacity as a corporate officer, dated July and August 2000, shows that NICAP's address is in Florida. (Ex. 2). NICAP's W-2 statements show that wages were paid to the decedent and Plaintiff who gave their address in Florida. (Ex. 2). The passport indicates that the decedent was born in Washington and that the passport was issued in Seattle in 1998, but does not indicate the decedent's home address. (Ex. 3). Therefore, this evidence is not sufficient to overturn the ALJ's finding that the decedent was both a resident and domiciliary of Florida.

ii. The Twins Do Not Qualify as "Children" of the Decedent Under Florida's Inheritance Laws

Under Florida's inheritance law, the possible heirs to an intestate estate include descendants, who are defined as persons "in any generational level down the applicable individual's descending line" and include, *inter alia*, children. Fla. Stat. Ann. § 731.201(9); *see* Fla. Stat. Ann. § 732.103(1). The laws of intestate succession specifically refer to "afterborn heirs," who are defined as "heirs of the decedent *conceived before his or her death*, but born thereafter." Fla. Stat. Ann. § 732.106 (emphasis added). The Supreme Court in *Leatherman v. Tarrant Co. Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 167 (1993) stated that when a statute explicitly mentions one type of individual, it implicitly excludes unmentioned others.

Florida law also provides:

> A child conceived from the eggs or sperm of a person or persons who died before the transfer of their eggs, sperms, or preembryos to a woman's body shall not be eligible for a claim against the decedent's estate unless the child has been provided for by the decedent's will.

Fla. Stat. Ann. § 742.17(4). This is further evidence that under Florida law a child posthumously conceived does not have the legally recognized relationship to the biological parent that a child conceived in the parent's lifetime would have.

In *Stephen ex rel. Stephen v. Barnhart*, 386 F. Supp. 2d 1257, 1264-1265 (M.D. Fla. 2005) the District Court for the Middle District of Florida denied a claim for child's insurance benefits filed on behalf of the posthumously conceived child. In *Stephen*, the decedent died before the conception of the minor child. The minor child's mother applied for child's insurance benefits under the Act. *Id.* at 1259. The court held that, under Florida's intestacy laws, the minor child could not inherit from the wage earner's estate. *Id.* at 1260. Therefore, the minor child was not the "child" of the wage earner under 42 U.S.C. § 416(h)(2)(A). The decedent was domiciled in Florida, so the same law applies here.

The minor children do not meet the definition of "child" under 42 U.S.C. Sections 416(e) and 416(h), so there is no need to address dependancy, the Act's second requirement of eligibility for benefits under 42 U.S.C. 402(d).

B. The ALJ was Not Biased

In Plaintiffs brief, Plaintiff points to facts from a Memorandum submitted to the ALJ that Plaintiff alleges are erroneous. Plaintiff argues that since the ALJ founnd these "errors" to be fact, it shows a "predisposition to ignore testimony." Plaintiffs Brief ("Pl. Br.") at 5. Plaintiff also asserts that the ALJ relied on a legal memorandum that was not served on Plaintiff. These are the most cogent allegations of bias by the Plaintiff. Plaintiff also restated arguments about domicile. However, even if Plaintiffs allegation that the ALJ adopted errors as fact is taken as true, Plaintiff admitted that "These errors are not in themselves critical . . . " *Id.* As for the legal memorandum, Plaintiffs attorneys responded affirmatively when asked if they had a chance to review the exhibits (Tr. 261) and stated that there was no objection when the ALJ asked if Plaintiff had any objection to accepting the documents into evidence (Tr. 262). This Court finds substantial evidence to support the ALJ's determinations, and finds allegations of bias to be unsupported by the record.

C. The Commissioner's Denial of Benefits Did Not Violate the Equal Protection Clause

Plaintiff's argument that it would be a violation of Equal Protection to apply the Ninth Circuit's holding in *Gillett-Netting v. Barnhart*, 371 F.3d 593 (9th Cir. 2004), entitling children conceived through in-vitro fertilization following their father's death to receive Social Security benefits, only within the jurisdiction of the Ninth Circuit, is unsupported.

The Act treats all children the same, whether or not posthumously conceived, through the neutral incorpora-

tion of state intestacy laws. *See, e.g., Vernoff v. Astrue*, 568 F.3d 1102, 1112 ("SSA is not excluding all posthumously conceived children, only those that do not meet the statutory requirements under state law."). The Supreme Court in *Vacco v. Quill*, 521 U.S. 793, 800 (1997) pronounced the principle that laws that apply to all evenhandedly "unquestionably comply" with the mandates of the Equal Protection Clause.

Congress, in mandating that the Commissioner look to state intestacy law in order to determine eligibility for Social Security benefits, recognized that states have great interest in regulating family issues. Under guidance of the Supreme Court, federal courts generally defer to state laws in this regard. In *United States v. Morrison*, 529 U.S. 598, 615 (2000) the Supreme Court identified "family law" as an area of "traditional state regulation."

D. The Commissioner was Reasonable to Limit the Acquiescence Ruling to the Ninth Circuit

The Commissioner was required to issue an acquiescence ruling under 20 C.F.R. Section 404.985 because the Ninth Circuit's holding in *Gillett-Netting* conflicts with the Commissioner's interpretation of the Act and no further judicial review was sought.

The Commissioner explained the logic of exempting only the parties in an applicable circuit from being bound by its interpretation of a rule in its response to a comment on the 1998 revisions to 20 C.F.R. Section 404.985:

> As discussed in the preamble to the 1990 acquiescence regulations, 55 FR at 1012-1013 a number of

> studies on the subject of Federal acquiescence have noted that nationwide adoption of the decision of the first circuit court to address an issue (intercircuit acquiescence) would preclude other circuit courts from considering the issue. In 1984 . . . the Solicitor General of the United States expressed similar concerns, stating that the practical effect of that legislation would be to require the Department of Justice to consider seeking Supreme Court review of the first adverse decision on an issue by any court of appeals. The Department of Justice reiterated these concerns in 1997. . . . An approach that would require nationwide adoption of the first circuit court decision on a particular issue would not improve SSA's adjudicatory and policy making processes, but would instead result in the first circuit court that happened to rule on an issue setting SSA's national rules on that subject. In effect, the circuit court that would rule first would rule last. This result could hardly be intended by any reasonable interpretation of acquiescence and would undermine the advantages, which would have been recognized by the Supreme Court, of having issues considered by more than one circuit.

63 Fed. Reg. 24927 (May 6, 1998). Instead of allowing more than one circuit to consider an issue, Plaintiffs argument would give Supreme Court precedence to the first circuit court to decide that particular issue.

IV. CONCLUSION

For the aforementioned reasons, the Court concludes that the ALJ's decision is affirmed. An appropriate Order accompanies this Opinion.

/s/ DENNIS M. CAVANAUGH
DENNIS M. CAVANAUGH, U.S.D.J.

Dated: March 23, 2010

APPENDIX D

SOCIAL SECURITY ADMINISTRATION
Office of Disability Adjudication and Review

DECISION

IN THE CASE OF	**CLAIM FOR**
Karen K. Capato (Natural Mother) o/b/o [REDACTED] and [REDACTED] (Infants)	Mother's Surviving Child's Insurance Benefits (Issue of Paternity)
(Claimant)	[REDACTED] [REDACTED] [REDACTED] [REDACTED] XREF: [REDACTED]
Robert N. Capato (Deceased)	(Deceased Wage Earner)
(Wage Earner)	(Social Security Number)

JURISDICTION

On October 31, 2003, the protective filing date, Karen K. Capato, the deceased wage earner's widow, filed concurrent applications under Title II of the Social Security Act, for mother's and surviving child's insurance benefits, on behalf of her natural children, [REDACTED] and [REDACTED] Capato, twins born on September 23, 2003, based upon the earnings record of Robert Capato, her husband and the deceased wage earner (exhibits 1, 2). Karen Capato is the mother and natural guardian of [REDACTED] and [REDACTED]. The application for mother's insurance benefits for herself was based upon her marriage to the deceased wage earner, on May 15,

1999, and her caring for his two newborn children. Her entitlement was contingent upon the entitlement of the children. Those claims were denied by the Administration and are now before me upon a timely written request for hearing, filed on May 18, 2006 (20 CFR 404.929 et seq.; exhibit 13). Karen K. Capato (hereinafter "the claimant"), along with several lay witnesses, appeared and testified at a hearing held on May 30, 2007, in Newark, New Jersey. The claimant is represented by Bernard and Robert Kuttner, attorneys at law (exhibits 15, 25 and 26).

ISSUES

The general issue to be determined in this case before me is whether [REDACTED] and [REDACTED] (hereinafter "the twins") are entitled to surviving child's insurance benefits, based upon the earnings record of Robert Capato, the deceased wage earner.

The specific issue to be decided by me is whether the evidence submitted is sufficient to establish that [REDACTED] and [REDACTED] are the surviving "children" of the deceased wage earner, pursuant to Sections 202 (d)(1) and 216(e); (h)(2)(3) of the Social Security act, as amended.

After careful review of the entire record, I find that [REDACTED] and [REDACTED] do not qualify as the deceased wage earner's "children" under the Social Security Act, and they do not qualify for surviving child's insurance benefits, based upon his earnings record, for the reasons hereinafter stated. Consequently, Karen Capato does not qualify for derivative mother's insurance benefits.

STATEMENT OF THE EVIDENCE

A marriage certificate, issued by the State of New Jersey, on June 11, 1999, indicates that Robert Capato and Karen M. (nee) Kuttner (Capato), then ages 42 and 36, respectively, were married on May 15, 1999, in Weehawken, New Jersey (exhibit 18).

In 1999, the wage earner was diagnosed with esophageal cancer (exhibits 3, 23, 24).

On December 12, 2001, in Fort Lauderdale, Florida, the wage earner, Robert Capato, executed his Last Will and Testament. He was then a resident of Broward County, Florida (exhibit 7).

On January 11, 2002, in Fort Lauderdale, Florida, the claimant, Karen Capato, executed her Last Will and Testament. She was then a resident of Broward County, Florida (exhibit 6).

A death certificate, issued by the State of Florida, establishes that Robert Capato, then age 44, died on March 23, 2002, in Boca Raton, Florida, as a result of metastatic esophageal cancer. His residence is listed as Pompano Beach, Florida. Thus, the wage earner died while domiciled in Florida. His wife, Karen Capato, is listed as informant of information and his surviving spouse (exhibit 17).

On September 23, 2003, approximately 18 months or 1 1/2 years after the death of the wage earner, [REDACTED] and [REDACTED], natural born twin children, were born to Karen Capato, in Morristown New Jersey. The father of the twin children, presently infants 4-years of age, is listed as "Robert Capato" (exhibits 19, 20).

On October 31, 2003, the protective filing date, Karen Capato, the surviving widow of Robert Capato, applied for surviving child's insurance benefits, on behalf of the newborn twins, based upon the earnings record of her husband, the deceased wage earner, Robert Capato (exhibit 2). The claimant, Karen Capato, also filed an application for mother's insurance benefits, on October 31, 2003, the protective filing date, for herself, based upon her marriage to the deceased wage earner and her caring for his two newborn children. Her entitlement was contingent upon the entitlement of the surviving children (exhibit 1).

The original and derivative claims were disallowed at the initial determination level by the Social Security Administration (exhibit 10). When the children's claims were denied, the claim for mother's insurance benefits was also denied for "no child in care" (exhibit 11).

Thereafter, on June 16, 2004, the claimant filed timely requests for reconsideration on all three claims, asserting that the initial decision failed to adhere to case law, that the medical evidence clearly establishes the paternity of the twins by Robert Capato and that Robert Capato intended to have children either after his cancer treatment or post-mortem (exhibit 8).

By Notice of Reconsideration, dated March 25, 2006, the claimant was advised that the twins were not entitled to surviving child's insurance benefits based on the Social Security earnings record of Robert Capato, because she had not submitted evidence sufficient to establish that the twins were the legal "child(ren)" of Robert Capato, under applicable State and Federal statutes (exhibit 12).

On May 18, 2006, the claimant filed her pending Request for Hearing, through her attorney, arguing that there is clear and convincing evidence that the twins are the "children" of the wage earner, that the wage earner made detailed arrangements which resulted in their birth, and that "New Jersey law, not Florida law, should govern as New Jersey has an interest to protect the rights of the twins, who were born in New Jersey and have lived in New Jersey their entire lives" (exhibit 13).

As primary evidence of the parent-child relationship of the twins, conceived after the death of their putative/alleged father, Robert Capato, the claimant has presented extensive medical records from the Northwest Center for Infertility and Reproductive Endocrinology, located in Florida, indicating that she had been a patient undergoing evaluation and treatment for her longstanding infertility and that after the wage earner's death, the claimant underwent fertility treatment using frozen sperm specimens donated by the deceased wage earner, prior to his death and with his consent, for insemination, which resulted in the birth of the twins, on September 23, 2003. Those embryos did in fact result from his sperm and through in vitro fertilization to the claimant, in January 2003, resulted in the births of the twins in September 2003. Thus, the twins were conceived by artificial means after the wage earner's death, in Florida. During the pregnancy, the claimant moved to New Jersey. She presently resides in Basking Ridge, New Jersey (exhibits 3, 23, 24).

ANALYSIS OF THE EVIDENCE AND APPLICABLE LAW

In this case, I have considered and reviewed the following applicable and relevant legal memoranda submitted by the Social Security Administration and the attorney for the claimant regarding the issue of paternity of the surviving children of the deceased wage earner:

SOCIAL SECURITY ADMINISTRATION

1) Memorandum from Assistant Regional Commissioner (San Francisco Region)—Request for Legal Opinion—dated January 4, 2005 (exhibit 10);

2) Legal Opinion from Atlanta Region—Office of Regional Chief Counsel by Assistant Regional Council—dated February 24, 2006 (exhibit 11); and,

3) Notice of Reconsideration—dated March 25, 2006 (exhibit 12).

LEGAL MEMORANDA OF ATTORNEY FOR THE CLAIMANT

1) May 14, 2007 (exhibit 15);

2) May 18, 2007 (exhibit 25); and,

3) June 4, 2007 (exhibit 26).

The major question presented for resolution is whether [REDACTED] and [REDACTED] (the twins), who were conceived and born after the death of their putative father, the wage earner, Robert Capato, qualify for child's insurance benefits as the wage earner's "children" under Title II of the Social Security Act.

The answer depends upon the status of children conceived by in vitro fertilization after a wage earner's death, predicated upon Florida State law.

Because the fertilization that produced the twins and their gestation period began after their putative father died (hence the descriptive term "after-children"), the threshold question is whether the twins qualify as the "children" of the wage earner, as that term is defined under the Social Security Act for purposes of child's insurance benefits. The Act requires that an individual be the dependent "child" of the wage earner to qualify for child's benefits (Section 202(d), Social Security Act). The Act defines a "child" and provides for the determination of family status in two relevant subsections (Section 216(e), (h), Social Security Act). The only provision of the Act under which an after child can establish eligibility requires a showing that the child could inherit the wage earner's property as his child under the intestacy laws of the state where the wage earner was domiciled when he died (Section 216(h)(2)(A), Social Security Act). There are no other provisions of the Act under which an after-child could qualify for benefits on the earnings record of a deceased wage earner. In this case, since the wage earner died before the twins' conception, it was impossible for him to acknowledge in writing that the twins were his children, or impossible to have been decreed by a court to be the father of the twins, or impossible to have been ordered by a court to contribute to the support of the twins, or show by satisfactory evidence that he was "living with or contributing to the support" of the twins when he died (Section 216(h)(3)(C)(i)(ii), Social Security Act).

Because the evidence shows that the wage earner died domiciled in Florida, I must apply Florida law in determining whether the twins would be entitled to a child's share of the wage earner's intestate personal property. The twins will qualify for Social Security child's benefits on the wage earner's earnings record only if they can establish that they could inherit a child's share of the wage earner's personal property under Florida's intestacy laws.

Florida's law of intestate succession specifically refers to "afterborn heirs" and defines them as "heirs of the decedent conceived before his or her death, but born thereafter" (Fla. Stat. Ann., Section 732.106 [2005]). This statue provides that "afterborn heirs" inherit intestate property as if they had been born in the decedent's lifetime (Id.). None of the Florida statutes directly define the term "conceived". In this case, the wage earner's sperm was harvested and frozen before his death, his wife was inseminated using the wage earner's sperm, and his wife conceived in January 2003. Because conception occurred in January 2003 as a result of in vitro fertilization, no interpretation has been found of relevant Florida statutes under which the twins could be found to have been "conceived" before the wage earner's death (exhibit 11).

The Florida Probate Code does not directly address the issue of inheritance rights arising from a post-mortem assisted fertilization and implantation. Although the wage earner's will provided for Devon Capato, a child born on August 22, 2001, through in vitro fertilization, two children by a previous marriage, and "an infant in gestation", the wage earner's will did not mention any children that might subsequently be conceived using his

frozen sperm. Thus, the twins could not claim to be beneficiaries of the wage earner's estate under Section 742.17(4) of the Florida Probate Code (exhibit 11).

More importantly, the twins' intestate inheritance rights are not governed by the wage earner's will. Florida's intestacy statutes control. It is significant that the Florida intestacy statutes do not mention explicitly the class of after-children among the surviving issue who can inherit by intestacy (the rules that govern distribution of property not covered by a will), as opposed to those who can inherit through a will. Thus, Florida statutes exclude the twins from collecting by intestacy because an after-child is eligible for a claim against a decedent "only" when the deceased parent provides for him or her in a will (Fla. Stat. Ann., Section 742.17(4); exhibit 11). Consequently, I conclude that, under Florida law, an after-child cannot inherit through intestacy and, therefore, under the Social Security Act, cannot be deemed to have the same status relative to taking intestate personal property as a child (Section 216(h)(2)(A), Social Security Act; exhibit 11).

Because the twins cannot inherit a child's share of the wage earner's personal property, under Florida's intestacy law, they do not qualify as the wage earner's "children" under the Social Security Act, and they do not qualify for child's benefits on his earnings record (42 U.S.C. Section 416(h)(2)(A); exhibit 11).

In his initial legal memorandum, dated May 14, 2007, the attorney for the claimant mounts a multi-faceted legal attack on the denial of benefits by the Administration grounded principally upon legal arguments incorporating the alleged violation of the statutory scheme of the

Social Security Act, the alleged violation of "equal protection" under the Fifth Amendment of the Constitution and his reliance as precedent upon a 9th Circuit Court of Appeals opinion, which ruled in favor of the children by holding that children conceived by in vitro fertilization ten (10) months following their father's death met the definition of "child" under the Social Security Act because they were the "natural, or biological, child[ren] of the insured" (exhibit 15; May 14, 2007; *Gillett-Netting v. Barnhart*, 371 F.3d 593 [9th Cir. 2004]). Additionally, the attorney for the claimant argues that since the twins were born in New Jersey where their mother was born and has resided, and, in view of her Florida residence for a period of only three (3) years, New Jersey law should apply and govern the issues in this case (exhibit 11, page 12).

In his subsequent legal memorandum, dated May 18, 2007, the attorney for the claimant again relies upon the 9th Circuit Court of Appeals *Gillett-Netting* case as a legal precedent exactly on point. Additionally, he advances the legal argument that the Social Security Administration had the right to issue an Acquiescence Ruling which restricts the holding of the 9th Circuit Court of Appeals to that jurisdiction, but the Administration has no right to attempt to limit a 9th Circuit Court of Appeals decision to that Circuit only, since the 9th Circuit case represents the "law of the land" applicable also in the Third (3rd) Circuit Court of Appeals, under whose jurisdiction the State of New Jersey falls (exhibit 25).

In his last memorandum of law, dated June 4, 2007, the attorney for the claimant argues that the wage earner was not a permanent resident of Florida, that he engaged in conduct demonstrating an intention to relocate

to New Jersey before his death, that the Commissioner of the Social Security Administration "pick[ed] a forum [Florida] where the infants born posthumously" have no rights which was in error and that application of the laws of Florida to the claimants is "improper and unfair" (exhibit 26).

As previously mentioned, the issue in this case is the eligibility for survivor benefits of two twins not only born, but conceived by in vitro fertilization after the father's death. It is noted that the record clearly establishes that the two children are, in fact, the children of the deceased wage earner, who died from cancer. His sperm were preserved and there is sufficient documentary evidence to show that the children resulted from the use of those sperm. The wage earner and the mother of the children were married, living in Florida and I find the testimony clearly establishes that it was the intent of the deceased wage earner (who knew that he was terminally ill) and his wife to have the children even after his death. There is a court case in the 9th Circuit Court of Appeals region in which the child was found entitled to such benefits, but there is no case in our 3rd Circuit.

The record in this case contains well-prepared legal briefs submitted by counsel for the claimants and from the Office of the Regional Chief Counsel, Region IV, Atlanta. I note initially that the Chief Counsel memo states that Florida law must be considered in this case. However, the legal representative for the claimants argues that Florida law should not be applied because the wage earner used to live in the 9th Circuit region of the country, and, furthermore, that he intended to move back to New Jersey. However, there is no legal merit to this argument. The claimant was clearly a resident of

Florida for several years at the time of his death. This is reflected in his death certificate and in the fact that his will was prepared under Florida law and filed for probate in that state. His intent to relocate to New Jersey, or his prior residence is not relevant to this proceeding.

Similarly lacking in legal merit is the claimant's argument that we are bound by 9th Circuit law because no other Circuit, or the United States Supreme Court, has ruled to the contrary. If this were true, then the Social Security Administration would always be bound by whatever Circuit decided an issue first, and the issue would never even get to another Circuit.

This is a case where medical-scientific technology has advanced faster than the regulatory process. I start by noting that I find fully credible all the testimony here, by the children's mother and by friends who also testified and/or submitted supporting statements. It is clear that this is a very sympathetic case, with nothing but the highest intentions involved. There is no ulterior motive here and the amount of expense to which the parents went in order to conceive the children is clearly more than they might ever receive as Social Security benefits. The parents in this matter showed courage in the face of tragic medical adversity and acted in a manner that we all can understand and to which we can readily relate.

When the wage earner discovered that he was seriously, very possibly fatally ill and needed to start chemotherapy, which was expected to result in sterility, he preserved his sperm in order to be able to have children in the future. The married couple began in vitro fertilization unsuccessfully, but the mother became pregnant the

conventional way and gave birth to Devon Capato. They had a child, but as the wage earner's condition worsened, they decided that they did not want Devon to be an only child, so they resumed the in vitro fertilization process. It was not successful until after the wage earner died, but as noted, there is no question that the children (as luck would have it, there were twins born), were his.

Thus, the issue is whether or not the two children conceived after the death of the father are entitled to survivor benefits under Social Security law. There is little doubt also that equity supports the claimant's applications and that a favorable decision would not be inconsistent with the intention of the statute. However, the issue is whether or not such a decision can be rendered by me, or, whether in fact this is a policy decision that needs to be addressed at the Social Security Administration level. It appears to me that the latter is the case.

After reading the arguments presented, I must conclude that even though the children were born in New Jersey, Florida law does apply with respect to their rights to inherit from the father. Under that law, as noted by the Regional Counsel's legal brief, the children are not entitled to inherit, and, therefore, are not entitled to Social Security benefits on the earnings record of the deceased wage earner. As noted, I feel constrained by applicable and controlling Social Security laws and regulations to find disentitlement, even though allowing benefits to the children would appear to be consistent with the purposes of the Social Security Act.

In accordance with Sections 202(d)(1) and 216(e) of the Social Security Act, [REDACTED] and [REDACTED]

are not entitled to surviving child's insurance benefits on the Social Security earnings record of the deceased wage earner.

FINDINGS OF FACT

After careful consideration of the entire record, I make the following findings of fact and conclusions of law:

1) The evidence of record establishes that [REDACTED] and [REDACTED] are the natural "after-children" of the deceased wage earner, conceived and born by means of frozen sperm specimens and in vitro fertilization.

2) [REDACTED] and [REDACTED] are not for Social Security purposes the "child(ren)" of the deceased wage earner, Robert Capato, under Florida state law as required by section 216(h)(2)(A) of the Social Security Act.

3) In accordance with Sections 202(d)(1) and 216(e) of the Social Security Act and under Social Security Regulations, [REDACTED] and [REDACTED] are not entitled to surviving child's insurance benefits, and accordingly Karen Capato is not entitled to mother's benefits on the Social Security earnings record of the deceased wage earner.

DECISION

It is my decision that based upon the applications for surviving child's insurance and derivative mother's insurance benefits protectively filed on October 31, 2003, [REDACTED] and [REDACTED] are not entitled to child's and mother's benefits, respectively, based upon

the earnings record of the deceased wage earner, Robert Capato.

/s/ JOEL H. FRIEDMAN
JOEL H. FRIEDMAN
Administrative Law Judge

[Nov. 28, 2007]
Date

APPENDIX E

1. 42 U.S.C. 402(d)(1) provides:

Old-age and survivors insurance benefit payments

(d) Child's insurance benefits

(1) Every child (as defined in section 416(e) of this title) of an individual entitled to old-age or disability insurance benefits, or of an individual who dies a fully or currently insured individual, if such child—

(A) has filed application for child's insurance benefits,

(B) at the time such application was filed was unmarried and (i) either had not attained the age of 18 or was a full-time elementary or secondary school student and had not attained the age of 19, or (ii) is under a disability (as defined in section 423(d) of this title) which began before he attained the age of 22, and

(C) was dependent upon such individual—

(i) if such individual is living, at the time such application was filed,

(ii) if such individual has died, at the time of such death, or

(iii) if such individual had a period of disability which continued until he became entitled to old-age or disability insurance benefits, or (if he has died) until the month of his death, at the beginning of such period of disability or at the time he became entitled to such benefits,

shall be entitled to a child's insurance benefit for each month, beginning with—

(i) in the case of a child (as so defined) of such an individual who has died, the first month in which such child meets the criteria specified in subparagraphs (A), (B), and (C), or

(ii) in case of a child (as so defined) of an individual entitled to an old-age insurance benefit or to a disability insurance benefit, the first month throughout which such child is a child (as so defined) and meets the criteria specified in subparagraphs (B) and (C) (if in such month he meets the criterion specified in subparagraph (A)),

whichever is earlier, and ending with the month preceding whichever of the following first occurs—

(D) the month in which such child dies or marries,

(E) the month in which such child attains the age of 18, but only if he (i) is not under a disability (as so defined) at the time he attains such age, and (ii) is not a full-time elementary or secondary school student during any part of such month,

(F) if such child was not under a disability (as so defined) at the time he attained the age of 18, the earlier of—

(i) the first month during no part of which he is a full-time elementary or secondary school student, or

(ii) the month in which he attains the age of 19,

but only if he was not under a disability (as so defined) in such earlier month;

(G) if such child was under a disability (as so defined) at the time he attained the age of 18 or if he was not under a disability (as so defined) at such time but was under a disability (as so defined) at or prior to the time he attained (or would attain) the age of 22—

(i) the termination month, subject to section 423(e) of this title (and for purposes of this subparagraph, the termination month for any individual shall be the third month following the month in which his disability ceases; except that, in the case of an individual who has a period of trial work which ends as determined by application of section 422(c)(4)(A) of this title, the termination month shall be the earlier of (I) the third month following the earliest month after the end of such period of trial work with respect to which such individual is determined to no longer be suffering from a disabling physical or mental impairment, or (II) the third month following the earliest month in which such individual engages or is determined able to engage in substantial gainful activity, but in no event earlier than the first month occurring after the 36 months following such period of trial work in which he engages or is determined able to engage in substantial gainful activity),

or (if later) the earlier of—

(ii) the first month during no part of which he is a full-time elementary or secondary school student, or

(iii) the month in which he attains the age of 19,

but only if he was not under a disability (as so defined) in such earlier month; or

(H) if the benefits under this subsection are based on the wages and self-employment income of a stepparent who is subsequently divorced from such child's natural parent, the month after the month in which such divorce becomes final.

Entitlement of any child to benefits under this subsection on the basis of the wages and self-employment income of an individual entitled to disability insurance benefits shall also end with the month before the first month for which such individual is not entitled to such benefits unless such individual is, for such later month, entitled to old-age insurance benefits or unless he dies in such month. No payment under this paragraph may be made to a child who would not meet the definition of disability in section 423(d) of this title except for paragraph (1)(B) thereof for any month in which he engages in substantial gainful activity.

2. 42 U.S.C. 416 provides in pertinent part:

Additional definitions

* * * * *

(e) Child

The term "child" means (1) the child or legally adopted child of an individual, (2) a stepchild who has been such stepchild for not less than one year immediately preceding the day on which application for child's insur-

ance benefits is filed or (if the insured individual is deceased) not less than nine months immediately preceding the day on which such individual died, and (3) a person who is the grandchild or stepgrandchild of an individual or his spouse, but only if (A) there was no natural or adoptive parent (other than such a parent who was under a disability, as defined in section 423(d) of this title) of such person living at the time (i) such individual became entitled to old-age insurance benefits or disability insurance benefits or died, or (ii) if such individual had a period of disability which continued until such individual became entitled to old-age insurance benefits or disability insurance benefits, or died, at the time such period of disability began, or (B) such person was legally adopted after the death of such individual by such individual's surviving spouse in an adoption that was decreed by a court of competent jurisdiction within the United States and such person's natural or adopting parent or stepparent was not living in such individual's household and making regular contributions toward such person's support at the time such individual died. For purposes of clause (1), a person shall be deemed, as of the date of death of an individual, to be the legally adopted child of such individual if such person was either living with or receiving at least one-half of his support from such individual at the time of such individual's death and was legally adopted by such individual's surviving spouse after such individual's death but only if (A) proceedings for the adoption of the child had been instituted by such individual before his death, or (B) such child was adopted by such individual's surviving spouse before the end of two years after (i) the day on which such individual died or (ii) August 28, 1958. For purposes of clause (2), a person who is not the stepchild of

an individual shall be deemed the stepchild of such individual if such individual was not the mother or adopting mother or the father or adopting father of such person and such individual and the mother or adopting mother, or the father or adopting father, as the case may be, of such person went through a marriage ceremony resulting in a purported marriage between them which, but for a legal impediment described in the last sentence of subsection (h)(1)(B) of this section, would have been a valid marriage. For purposes of clause (2), a child shall be deemed to have been the stepchild of an individual for a period of one year throughout the month in which occurs the expiration of such one year. For purposes of clause (3), a person shall be deemed to have no natural or adoptive parent living (other than a parent who was under a disability) throughout the most recent month in which a natural or adoptive parent (not under a disability) dies.

* * * * *

(h) **Determination of family status**

(1)(A)(i) An applicant is the wife, husband, widow, or widower of a fully or currently insured individual for purposes of this subchapter if the courts of the State in which such insured individual is domiciled at the time such applicant files an application, or, if such insured individual is dead, the courts of the State in which he was domiciled at the time of death, or, if such insured individual is or was not so domiciled in any State, the courts of the District of Columbia, would find that such applicant and such insured individual were validly married at the time such applicant files such application or, if such insured individual is dead, at the time he died.

(ii) If such courts would not find that such applicant and such insured individual were validly married at such time, such applicant shall, nevertheless be deemed to be the wife, husband, widow, or widower, as the case may be, of such insured individual if such applicant would, under the laws applied by such courts in determining the devolution of intestate personal property, have the same status with respect to the taking of such property as a wife, husband, widow, or widower of such insured individual.

(B)(i) In any case where under subparagraph (A) an applicant is not (and is not deemed to be) the wife, widow, husband, or widower of a fully or currently insured individual, or where under subsection (b), (c), (d), (f), or (g) of this section such applicant is not the wife, divorced wife, widow, surviving divorced wife, husband, divorced husband, widower, or surviving divorced husband of such individual, but it is established to the satisfaction of the Commissioner of Social Security that such applicant in good faith went through a marriage ceremony with such individual resulting in a purported marriage between them which, but for a legal impediment not known to the applicant at the time of such ceremony, would have been a valid marriage, then, for purposes of subparagraph (A) and subsections (b), (c), (d), (f), and (g) of this section, such purported marriage shall be deemed to be a valid marriage. Notwithstanding the preceding sentence, in the case of any person who would be deemed under the preceding sentence a wife, widow, husband, or widower of the insured individual, such marriage shall not be deemed to be a valid marriage unless the applicant and the insured individual were living in the same household at the time of the death of the insured individual or (if the insured individual is living) at

the time the applicant files the application. A marriage that is deemed to be a valid marriage by reason of the preceding sentence shall continue to be deemed a valid marriage if the insured individual and the person entitled to benefits as the wife or husband of the insured individual are no longer living in the same household at the time of the death of such insured individual.

(ii) The provisions of clause (i) shall not apply if the Commissioner of Social Security determines, on the basis of information brought to the Commissioner's attention, that such applicant entered into such purported marriage with such insured individual with knowledge that it would not be a valid marriage.

(iii) The entitlement to a monthly benefit under subsection (b) or (c) of section 402 of this title, based on the wages and self-employment income of such insured individual, of a person who would not be deemed to be a wife or husband of such insured individual but for this subparagraph, shall end with the month before the month in which such person enters into a marriage, valid without regard to this subparagraph, with a person other than such insured individual.

(iv) For purposes of this subparagraph, a legal impediment to the validity of a purported marriage includes only an impediment (I) resulting from the lack of dissolution of a previous marriage or otherwise arising out of such previous marriage or its dissolution, or (II) resulting from a defect in the procedure followed in connection with such purported marriage.

(2)(A) In determining whether an applicant is the child or parent of a fully or currently insured individual for purposes of this subchapter, the Commissioner of Social Security shall apply such law as would be applied

in determining the devolution of intestate personal property by the courts of the State in which such insured individual is domiciled at the time such applicant files application, or, if such insured individual is dead, by the courts of the State in which he was domiciled at the time of his death, or, if such insured individual is or was not so domiciled in any State, by the courts of the District of Columbia. Applicants who according to such law would have the same status relative to taking intestate personal property as a child or parent shall be deemed such.

(B) If an applicant is a son or daughter of a fully or currently insured individual but is not (and is not deemed to be) the child of such insured individual under subparagraph (A), such applicant shall nevertheless be deemed to be the child of such insured individual if such insured individual and the mother or father, as the case may be, of such applicant went through a marriage ceremony resulting in a purported marriage between them which, but for a legal impediment described in the last sentence of paragraph (1)(B), would have been a valid marriage.

(3) An applicant who is the son or daughter of a fully or currently insured individual, but who is not (and is not deemed to be) the child of such insured individual under paragraph (2) of this subsection, shall nevertheless be deemed to be the child of such insured individual if:

(A) in the case of an insured individual entitled to old-age insurance benefits (who was not, in the month preceding such entitlement, entitled to disability insurance benefits)—

(i) such insured individual—

(I) has acknowledged in writing that the applicant is his or her son or daughter,

(II) has been decreed by a court to be the mother or father of the applicant, or

(III) has been ordered by a court to contribute to the support of the applicant because the applicant is his or her son or daughter,

and such acknowledgment, court decree, or court order was made not less than one year before such insured individual became entitled to old-age insurance benefits or attained retirement age (as defined in subsection (l) of this section), whichever is earlier; or

(ii) such insured individual is shown by evidence satisfactory to the Commissioner of Social Security to be the mother or father of the applicant and was living with or contributing to the support of the applicant at the time such applicant's application for benefits was filed;

(B) in the case of an insured individual entitled to disability insurance benefits, or who was entitled to such benefits in the month preceding the first month for which he or she was entitled to old-age insurance benefits—

(i) such insured individual—

(I) has acknowledged in writing that the applicant is his or her son or daughter,

(II) has been decreed by a court to be the mother or father of the applicant, or

(III) has been ordered by a court to contribute to the support of the applicant because the applicant is his or her son or daughter,

and such acknowledgment, court decree, or court order was made before such insured individual's most recent period of disability began; or

(ii) such insured individual is shown by evidence satisfactory to the Commissioner of Social Security to be the mother or father of the applicant and was living with or contributing to the support of that applicant at the time such applicant's application for benefits was filed;

(C) in the case of a deceased individual—

(i) such insured individual—

(I) had acknowledged in writing that the applicant is his or her son or daughter,

(II) had been decreed by a court to be the mother or father of the applicant, or

(III) had been ordered by a court to contribute to the support of the applicant because the applicant was his or her son or daughter,

and such acknowledgment, court decree, or court order was made before the death of such insured individual, or

(ii) such insured individual is shown by evidence satisfactory to the Commissioner of Social Security to have been the mother or father of the

applicant, and such insured individual was living with or contributing to the support of the applicant at the time such insured individual died.

For purposes of subparagraphs (A)(i) and (B)(i), an acknowledgment, court decree, or court order shall be deemed to have occurred on the first day of the month in which it actually occurred.

* * * * *

OPPOSITION BRIEF

CORRECTED COPY

Supreme Court, U.S.
FILED
OCT 7 - 2011
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No. 11-159

In the Supreme Court of the United States

MICHAEL J. ASTRUE,
COMMISSIONER OF SOCIAL SECURITY
Petitioner,

v.

KAREN K. CAPATO, ON BEHALF OF B.N.C., ET AL.
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Third Circuit correctly determined that a posthumously conceived child is a "child" for the purpose of receiving survivor benefits under Title II of the Social Security Act, 42 U.S.C. § 401 *et seq.*

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BRIEF IN OPPOSITION

Respondent, Karen K. Capato, respectfully requests that this Court deny the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

STATEMENT

In this case, the Third Circuit reached the unsurprising conclusion that the biological offspring of a married couple is the "child" of each of its parents, as that word is used in the Social Security Act (the "Act"). This Court should not review that decision. Even if the Court were inclined to consider the issue presented in the government's petition, this would be the wrong case in which to do so: Unresolved issues below leave unclear whether adoption of the government's proposed rule would change the ultimate outcome here. There also is no compelling need for immediate resolution of the circuit conflict described by the government so as to achieve national uniformity in the treatment of posthumously conceived children: The government's proposed rule would have entitlement to federal benefits turn on the varying intestacy laws of the individual States, and therefore would *perpetuate* inconsistency in the treatment of similarly situated children from one State to another. And, not least, the decision below is correct, properly applying the plain language and manifest purpose of the Act. The government's petition accordingly should be denied.

A. Statutory Provisions

1. Enacted in 1935, the Act was lauded as "the broadest program for social security ever launched at one time by any government." H.R. Rep. No. 76-728,

at 3 (1939). Placing "the security of the men, women, and children of the Nation first," the Act promised to provide a "safeguard against misfortunes which cannot be wholly eliminated in this man-made world of ours." Review of Legislative Accomplishments of the Administration and Congress, H.R. Doc. No. 73-397, at 2 (1934). To provide that safeguard against calamity, Title II of the 1935 Act offered disability and retirement benefits to insured workers. 42 U.S.C. § 401 *et seq.*

In 1939, Congress amended the Act to offer benefits to the surviving family members, including dependent minor children, of a deceased wage earner. Social Security Act Amendments of 1939, Pub. L. No. 76-379, tit. II, § 402, 53 Stat. 1360, 1363. Congress intended the amendments "to strengthen and extend the principles and objectives of the" earlier Act, and made clear its hope that survivor benefits would offer "more adequate protection to the family as a unit." H.R. Rep. No. 76-728, at 5, 7. In 1965, Congress amended the law once again—this time, to cover children born out of wedlock who were (in Congress's eyes) unfairly barred by state intestacy laws from receiving benefits. Old-Age, Survivors, and Disability Insurance Amendments of 1965, Pub. L. No. 89-97, tit. III, § 339, 79 Stat. 286, 409; see also S. Rep. No. 89-404, at 109-110 (1965). The amended Act has thus remained true to Congress's conviction, first voiced in 1935, that children are at "[t]he heart" of the statutory regime. S. Rep. No. 74-628, at 16 (1935).

2. Consistent with this core purpose, the Act grants survivor benefits to certain categories of children following the death of a "fully or currently insured individual." 42 U.S.C. § 402(d)(1). Section 402(d)(1) generally provides for the payment of bene-

fits to "[e]very child (as defined in section 416(e) of this title) * * * of an individual who dies a fully or currently insured individual * * * ." Section 416(e), in turn, provides that "[t]he term 'child' means * * * the child or legally adopted child of an individual," as well as, in defined circumstances, the "stepchild" or "grandchild" of an individual. 42 U.S.C. § 416(e). Sections 402(d)(1)(A)-(C) also set out the general criteria that a "child" must satisfy to receive benefits, providing, in part, that (1) an application for benefits must be filed, (2) the child must be unmarried and under the age of eighteen, and (3) the child must have been dependent on the deceased wage earner "at the time of [the wage earner's] death." See 42 U.S.C. §§ 402(d)(1)(A)-(C).[1]

This case is primarily concerned with the relation of Section 416(e) to another provision of the Act, 42 U.S.C. § 416(h), which is entitled "Determination of family status." As this title suggests, Section 416(h) offers direction on how to determine the existence of certain family relationships—such as, for example, "wife, husband, widow, or widower," 42 U.S.C. § 416(h)(1)(A)(i)—in specified circumstances. A part of this provision states that, "[i]n determining whether an applicant is the child * * * of a fully or currently insured individual for purposes of this subchapter," the Commissioner of Social Security is to apply the intestacy laws of the State "in which [the wage earner] was domiciled at the time of his death." 42 U.S.C. § 416(h)(2)(A). Any person "who according

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[1] The Act raises the eligibility age by one year for full-time students and also extends eligibility to disabled children if their disability began before the age of twenty-two. See 42 U.S.C. § 402(d)(1)(B).

to such law would have the same status relative to taking intestate personal property as a child * * * shall be deemed such." *Ibid.* The Act then lists three other ways in which an applicant who does not qualify as a child under 42 U.S.C. § 416(h)(2)(A) may nevertheless be "deemed" to have child status for purposes of Section 416(e). 42 U.S.C. § 416(h)(2)(B); *id.* §§ 416(h)(3)(C)(i)-(ii).

B. Factual Background

Robert Nicholas ("Nick") Capato was born in Washington State in 1957 and lived there or in California for most of his life; he met his future wife, respondent Karen Kuttner, in the mid-1990s in Seattle, and they subsequently lived for two years in Colorado. Pet. App. 2a; see Pet. App. 16a. They were married in New Jersey. Pet. App. 2a. In 1999, the Capatos started a chain of health clubs in Florida, although they planned ultimately to return to New Jersey "and took some steps in that regard." Pet. App. 2a; see Pet. App. 16a. During this time, Nick Capato made repeated visits to New Jersey to look for a family home and to set up a business there. ALJ Hr'g Tr. at 11-12.

In summer 1999, the Capatos' plans were tragically interrupted when Nick Capato was diagnosed with esophageal cancer. Pet. App. 2a. Aware that his chemotherapy treatment would likely leave him sterile, Nick Capato deposited sperm at a fertility clinic so that respondent might subsequently conceive his children. Pet. App. 2a, 16a-17a.

In 2001, respondent gave birth to a son, Devon, who was conceived naturally despite Nick Capato's radiation treatments and chemotherapy. Pet. App. 2a, 17a. A few months later, however, Nick Capato's

doctor informed him that his prognosis had worsened. Pet. App. 18a. Natural conception became impossible. The Capatos, hoping to give Devon siblings, turned to in vitro fertilization (IVF) using Nick Capato's sperm. Pet. App. 3a, 19a. They also "specifically" told their attorney to mention unborn children in Nick Capato's will so that "'they'd have the rights and be supported in the same way that [Devon] was already privileged to [be],'" Pet. App. 3a (citation omitted). Similarly, the Capatos acknowledged before a notary "that any child(ren) born to us, who were conceived by the use of our embryo(s)[,] shall in all respects be our natural child(ren)[] and are the heirs to our bodies * * * for all purposes (including, but not limited to[,] descent of property)." ALJ R. 47. Nick Capato's will, however, did not include this provision at the time of his death. Pet. App. 3a.

A few months later, Nick Capato passed away at the age of forty-four. Pet. App. 2a. Following a successful IVF procedure, respondent gave birth to twins eighteen months after his death. Pet. App 19a. The government does not dispute that the twins are Nick Capato's biological children.

C. Administrative Proceedings

One month after the twins were born, respondent applied under the Act for survivor benefits on behalf of her two newborns. Pet. App. 3a. After the Social Security Administration ("SSA") denied her claim, respondent requested a hearing before an administrative law judge ("ALJ"). Pet. App. 3a. Respondent and multiple other witnesses testified at the hearing. Pet App. 3a.

The ALJ found all of the testimony "fully credible," and he praised the Capatos' "courage" and

"highest intentions." Pet. App. 44a. He further acknowledged that "equity supports the claimant's applications" and that "allowing benefits to the children would appear to be consistent with the purposes of the Social Security Act." Pet. App. 45a. The ALJ believed, however, that Section 416(h)(2)(A) controls the definition of a "child" entitled to benefits under the Act, and that a child conceived after the death of the wage earner can demonstrate eligibility for survivor benefits only by showing that he or she is entitled to inherit from the wage earner under the intestacy laws of the State where the wage earner was domiciled at the time of death. Pet. App. 39a. The ALJ also determined that Nick Capato was domiciled in Florida when he died and that posthumously conceived children may not inherit from their father under Florida law. Pet. App. 40a-41a. The ALJ thus ruled that the Capato twins were ineligible for survivor benefits. Pet. App. 46a-47a.

D. Court Proceedings

1. The district court affirmed. Pet. App. 15a. The court acknowledged that Section 416(e) of the Act defines "child" as "the child * * * of an individual." Pet. App. 23a. But, like the ALJ, the court looked for guidance not to Section 416(e) but to Section 416(h)(2)(A), concluding that state intestacy law is the "primary method" for determining whether an individual is a "child" for purposes of the Act. Pet. App. 23a. Agreeing with the ALJ that Nick Capato was domiciled in Florida at the time of his death, the court found that "[t]he Capato twins are neither heirs under Florida's intestacy law nor beneficiaries of the decedent's will." Pet. App. 24a. The court thus concluded that "the twins are not entitled to Social Security benefits." Pet. App. 24a.

2. The court of appeals reversed, holding that the Capato twins are entitled to survivor benefits under Sections 402(d) and 416(e). Pet. App. 12a. The court noted that "Section 416(e) defines 'child' broadly as, in relevant part, 'the child or legally adopted child of an individual,'" and that "Section 416(h), entitled 'Determination of family status,' offers other ways by which to determine whether the applicant is a 'child.'" Pet. App. 6a. Against this background, the court rejected the government's argument that status as a child is in all circumstances determined by Section 416(h) and state intestacy law: "To accept the argument of the Commissioner [of Social Security], one would have to ignore the plain language of § 416(e) and find that the biological child of a married couple is not a 'child' within the meaning of § 402(d) unless the child can inherit under the intestacy law of the domicile of the decedent. There is no reason apparent to us why that should be so * * * ." Pet. App. 7a-8a.

Responding specifically to the government's reliance on Section 416(h), the court explained that "[t]he plain language of § 402(d) and 416(e) provides a threshold basis for defining benefit eligibility," while "[t]he provisions of § 416(h) then provide for '[d]etermination of family status'—subsection (h)'s heading—to determine eligibility where a claimant's status as the deceased wage-earner's child is in doubt." Pet. App. 10a. "[A] basic tenet of statutory construction," the court continued, "is that [i]n the absence of an indication to the contrary, words in a statute are assumed to bear their ordinary, contemporary, common meaning." Pet. App. 10a (citation and internal quotation marks omitted). And "[t]he term 'child' in § 416(e) requires no further definition when all parties agree that the applicants here are

the biological offspring of the Capatos." Pet. App. 10a-11a. Thus faced with "the narrow question" whether "the undisputed biological children of a deceased wage earner and his widow [are] 'children' within the meaning of the Act," the court concluded that "the answer is a resounding 'Yes.'" Pet. App. 12a.

Having reached this conclusion, the court found it unnecessary to decide definitively where Nick Capato was domiciled at the time of his death. Pet. App. 12a n.6. Instead, the court remanded the case for a determination whether his "children were dependent or deemed dependent on him, the final requisite of the Act remaining to be satisfied." Pet. App. 12a.

REASONS FOR DENYING THE PETITION

Simply stated, this is the wrong case in which to resolve the conflict in the circuits asserted by the government in its petition. The Third Circuit's interpretation of the Act is correct: That court was right to read the statute as using the word "child" in its ordinary and wholly uncontroversial sense as including the biological offspring of a married parent. This being so, there is no compelling need for this Court to review the decision below. There is substantial reason to believe that *this* case would come out the same way in the end under both the government's and the Third Circuit's approach. And the government has managed to apply different readings of the Act in different circuits for many years without any evident difficulty. In these circumstances, if this Court is to reach the issue presented here, it should await the arrival of a better vehicle.

I. THIS CASE IS A POOR VEHICLE FOR REVIEW.

Whatever merit there is to the government's claim of a conflict in the circuits, this case does not present an appropriate vehicle in which to reach the question presented. The reason is simple: It is not apparent that answering the government's question will have any effect on the ultimate outcome of this case. On the one hand, the Capato twins may well be entitled to benefits even under the government's own rule because there is substantial reason to believe that, at the time of his death, Nick Capato was domiciled in a State whose intestacy laws would allow the twins to recover from his estate; on the other, the government takes the position that the twins are not entitled to recover even under the Third Circuit's rule because they were not dependents of their father at the time of his death. If the Court is going to resolve this issue, it should be in a case that does not involve such uncertainties and in which the issue is presented more concretely.

1. At the outset, substantial evidence indicates that Nick Capato was not domiciled in Florida at the time of his death. His connections with Washington State were deep and long-standing. He was born in Washington, his business was incorporated there, and his passport listed Seattle as its place of issuance. Pet. App. 26a-27a. He spent the vast majority of his life in California and Washington. ALJ Hr'g Tr. at 24.

In contrast, Nick Capato's ties to Florida were weak and temporary. He and respondent spent a total of just three years in Florida. Pet. App. 2a. Rather than buying a home there, the Capatos briefly rented an apartment and lived with respondent's

grandmother as Nick Capato expanded his business. ALJ Hr'g Tr. at 24. The Capatos made no further attempt to make a home in Florida because they never intended to stay there. See *ibid.*

Instead, before Nick Capato's death, the Capatos made plans to move to New Jersey. Pet. App. 2a, 16a-17a. They began searching for a suitable home in that State, and Nick Capato attempted to incorporate a business there. Pet. App. 17a. These arrangements to move so soon after arriving in Florida strongly suggest that the Capatos viewed Florida as no more than a short-term residence. And these facts cast significant doubt on the ALJ's determination that Nick Capato was domiciled in Florida. The Third Circuit, although stating in passing that it "would likely" find Florida to be his domicile were it to decide the question, pointedly left the issue unresolved. Pet. App. 12a n.6. If this matter is revisited in further proceedings, the result could well be a finding that Nick Capato was domiciled outside of Florida.

And such a determination could be dispositive of the twins' eligibility for benefits under the interpretation of Sections 402(d) and 416 urged by the government. Many States and the District of Columbia, unlike Florida, allow for posthumously born children to receive distributions from the estate of a deceased parent without reference to the date of conception. See, *e.g.*, D.C. Code § 19-314 (2011); 755 Ill. Comp. Stat. 5/2-3 (2011). Others deem children born within a specified period after a parent's death capable of inheriting under certain circumstances. See, *e.g.*, Cal. Prob. Code § 249.5(c) (West 2011) (providing that the child must be conceived within two years of the parent's death); La. Rev. Stat. Ann. § 9:391.1

(2011) (providing that the child must be born within three years of the parent's death).

For this reason, even if the government were to prevail on its argument concerning the relevance of state intestacy law, the Capato twins may still be eligible for benefits. Washington intestacy law defines "issue" as "*all* the lineal descendants of an individual." Wash. Rev. Code Ann. § 11.02.005(4) (West 2011) (emphasis added). It provides for the distribution of a share of the decedent's estate "[t]o the issue of the intestate." *Id.* § 11.04.015(2)(a). Posthumously conceived children are never explicitly mentioned in this section, though children "conceived prior to the death of a parent but born after the death of the deceased parent" are deemed "the *surviving issue* of the deceased parent * * * ." *Id.* § 11.02.005(4) (emphasis added). It is telling that the legislature chose not to limit the distribution of an intestate decedent's estate to surviving issue or any other narrow subset of a decedent's lineal descendants. Washington intestacy law, by imbuing "all [] lineal descendants" with the ability to inherit, is plausibly read as encompassing children conceived after the death of a biological parent.

Similarly, both New Jersey and California intestacy law support the proposition that the Capato twins may be eligible for survivor benefits even if the government prevails on the question it has presented to this Court. In circumstances quite like those here, a New Jersey court determined that a pair of posthumously conceived twins born eighteen months after the death of their father could inherit from their father's estate. *In re Estate of Kolacy*, 753 A.2d 1257 (N.J. Super. Ct. Ch. Div. 2000). And under California law, a child "in utero using the decedent's genetic

material * * * within two years of the date of issuance of a certificate of the decedent's death" may, when certain criteria are met, inherit from an intestate parent. Cal. Probate Code § 249.5(c). Accordingly, a determination that Nick Capato's domicile at the time of death was Washington, New Jersey, or California would make a decision by this Court in the government's favor immaterial to the final outcome.

2. In addition, the government's position is that the Capato twins should be denied benefits even under the Third Circuit's rule. To be eligible for survivor benefits under Section 402(d)(1), a qualifying child must be "dependent upon" the insured decedent. 42 U.S.C. § 402(d)(1)(C). Although we maintain that the twins satisfy this test, see *Gillett-Netting* v. *Barnhart*, 371 F.3d 593, 599 (9th Cir. 2004), the government took the position below that the twins were not dependents of their father. The Third Circuit left the question open, see Pet. App. 8a n.3, and "remand[ed] for a determination of whether, as of the date of Mr. Capato's death, his children were dependent or deemed dependent on him." Pet. App. 12a. If the courts below agree with the government on this issue, benefits will be unavailable no matter how this Court answers the question presented in the government's petition, again making resolution of that question immaterial to the ultimate outcome.

As a consequence, deciding the question presented by the government may be of only theoretical importance in this case. For this reason, review of the decision below is premature at this time.

II. THERE IS NO NEED FOR IMMEDIATE REVIEW.

Denial of the petition also is warranted for a second, related reason: although we acknowledge the disagreement between the courts of appeals described by the government in its petition, Pet. 17-18,[2] there is no compelling need for immediate review of the question presented.

First of all, this is not a case where adoption of the government's rule will lead to nationwide uniformity in the treatment accorded the affected class of children. To the contrary, the government embraces a rule that avowedly accords *different* treatment to similarly situated children from State to State, depending upon the vagaries of state intestacy law.

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[2] We also note that the Eighth Circuit has issued its decision in *Beeler* v. *Astrue*, 651 F.3d 954 (8th Cir. 2011), which was pending when the government filed its petition, see Pet. 18 n.*, disagreeing with the Third Circuit's holding in this case and agreeing with the Fourth Circuit's decision in *Schafer* v. *Astrue*, 641 F.3d 49 (4th Cir. 2011). Having said that, the government overstates the extent of the conflict; several of the decisions it cites involved very different facts than does this case and are not directly germane to the issue here. See Pet. 18-19. For example, *Conlon* v. *Heckler*, 719 F.2d 788 (5th Cir. 1983), concerned a child born out of wedlock rather than a posthumously conceived child. At issue in *DeSonier* v. *Sullivan*, 906 F.2d 228 (6th Cir. 1990), was which version of Texas intestacy law should be applied: the law in effect at the time of the wage earner's death or the law in effect at the time of the application for benefits. The *DeSonier* court did not address whether the term "child" includes a posthumously conceived child. And *Javier* v. *Commissioner of Social Security*, 407 F.3d 1244 (D.C. Cir. 2005), considered doctrines of standing to challenge a paternity determination under Philippine law—not whether a posthumously conceived child was legally a "child." These decisions do not squarely conflict with the holding below.

As a result, any regional variation attributable to the conflict among the circuits does not produce the kind of pressing concern that might arise where the courts of appeals disagree about the meaning of a substantive federal rule.

Nor does the varying statement of the rule by the courts of appeals create significant administrative problems for the government. Under *Gillett-Netting* v. *Barnhart*, for the last seven years posthumously conceived children have been considered "children" for the purpose of receiving survivor benefits in the nine States that make up the Ninth Circuit. The government has had no evident difficulty dealing with this variation: The Commissioner of Social Security issued an "Acquiescence Ruling" in 2005 after the decision in *Gillett-Netting*. See Social Security Acquiescence Ruling 05–1(9), 70 Fed. Reg. 55,656, 55,657 (Sept. 22, 2005).

Indeed, administration of the Act is likely to be far more difficult and expensive under the government's approach, both for the government and for private litigants, than it is under the Third Circuit's rule. In every case involving a posthumously conceived child there will be both a factual question (as to the father's place of domicile at death) and a legal question (as to the intestacy rule of that State). As this case demonstrates, those inquiries will often be complex and difficult. But there is no need at all to answer those questions under the Third Circuit's commonsense application of the Act.

Moreover, there may well be better vehicles for the Court to use in addressing the issue presented by the government. In *Schafer* v. *Astrue*, 641 F.3d 49 (4th Cir. 2011), for example, the decedent's domicile was not contested and does not remain an open is-

sue, as it does in this case. And because the Fourth Circuit in *Schafer* affirmed the ALJ and district court rulings against the plaintiff's posthumously conceived child, no question of dependency remains to be resolved. *Id.* at 52 n.2. Similarly, in *Beeler* v. *Astrue*, 651 F.3d 954 (8th Cir. 2011), the Eighth Circuit came to a final conclusion on all relevant issues. *Schafer*, *Beeler*, or a future case in which the domicile and dependency issues have been satisfactorily resolved would provide a more suitable vehicle for resolution of the question raised in the government's petition.

III. THE DECISION BELOW IS CORRECT.

Finally, there is an additional, very significant reason why immediate review is not warranted: The decision below is correct. The Third Circuit's reading of the Act comports with the statute's plain text and clear purpose. The government's does not.

A. The Government's Reading Cannot Be Reconciled With The Text And Structure Of The Statute.

1. The Act sets out a threshold requirement for the award of survivor benefits: that the survivor be a "child." In particular, Section 402(d)(1) provides that, upon the satisfaction of certain conditions, "[e]very child (as defined in section 416(e) of this title) * * * of an individual who dies a fully or currently insured individual * * * shall be entitled to child's insurance benefit." The question before the Third Circuit was whether the Capato twins were "children" within the meaning of this provision.

The court answered this question by applying basic principles of statutory interpretation. All agree that "[t]he task of resolving [a] dispute over the

meaning of [a statute] begins * * * with the language of the statute itself." *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). The Third Circuit therefore looked at the definition of "child" provided by Section 416(e). as it was directed to do by Section 402(d)(1). Section 416(e) includes several definitions of "child" that are applicable in different situations, but the first, and most general, is broad and simple: "The term 'child' means (1) the child or legally adopted child of an individual * * * ." 42 U.S.C. 416(e).[3]

The Third Circuit found this definition of "child" to be "unambiguous[]" and to cover the Capato twins. Pet. App. 11a n.5. As the court noted, because the twins are the "biological offspring" of the deceased party, "[t]he term 'child' [in the statute] requires no further definition." Pet. App. 10a. That holding was correct: The ordinary definition of a "child" is a "son or daughter," terms that in turn are understood to mean a male or female "descendant." *Random House Webster's Unabridged Dictionary* 358, 509, 1819 (2d ed. 2001). Or, as the Restatement (Third) of Property puts it, "[a]n individual is the child of his or her genetic parents." Restatement (Third) of Property (Wills & Donative Transfers) § 2.5(1) (1999). See also *Gillett-Netting*, 371 F.3d at 596-597; *Tsosie* v. *Califano*, 630 F.2d 1328, 1333 (9th Cir. 1980) ("Under § 416(e), the term 'child' includes a person's natural children and his legally adopted children.").

The Third Circuit thus did no more than apply common sense and the guidance of this Court: "In the absence of an indication to the contrary, words in

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[3] Other definitions of a "child," which are not relevant to this case, address stepchildren and grandchildren.

a statute are assumed to bear their ordinary, contemporary, common meaning." *Walters* v. *Metro. Educ. Enters. Inc.*, 519 U.S. 202, 207 (1997) (citation omitted). And the government very notably does not deny that, under the ordinary meaning of the word, the Capato twins are the "children" of their biological father. The government's approach to the question here thus discounts the possibility that, in Sections 402(d)(1) and 416(e), Congress simply "sa[id] * * * what it mean[t] and mean[t] * * * what it sa[id]." *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 254 (1992).[4]

2. Instead, the government argues that *another* provision of the statute, Section 416(h)(2), must be used to modify the meaning of "child" as that term is defined in Section 416(e). Pet. 7. Section 416(h)(2)(A) provides that the Commissioner, in determining whether an applicant is a "child" or a "parent," "shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which such insured individual * * * was domiciled at the time of his death." Although Sections 402(d)(1) and 416(e) make no reference to Section 416(h), the government insists that

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[4] For this reason, the government's discussion of agency deference, Pet. 16-17, is beside the point. Judicial deference to agency determinations is appropriate only "if the statute is silent or ambiguous with respect to the specific issue" and Congress has "explicitly left a gap for an agency to fill." *Chevron U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-844 (1984); *see also Conn. Nat'l Bank*, 503 U.S. at 254 ("When the words of a statute are unambiguous," then "judicial inquiry is complete." (quoting *Rubin* v. *United States*, 449 U.S. 424, 430 (1981))). The word "child" is not in the least ambiguous as it applies in the circumstances of this case, and there accordingly is no gap to fill.

"further defin[ition]," omitted from Section 416(e) but needed to make that provision comprehensible, "is supplied by "Subsection (h) of Section 416." Pet. 7. The government appears to rest this assertion on two propositions: that, in common parlance, it is not evident that the "'undisputed biological child'" of married parents *is* the "child" of its parents, Pet. 8; and that use of the word "shall" in Section 416(h)(2)(A) means that the provision trumps the Section 416(e) definition, Pet. 7. Both of these propositions are wrong.

As to the government's first point, far from being a "definitional tautology," Pet. 9 (quoting *Conlon* v. *Heckler*, 719 F.2d 788, 800 (5th Cir. 1983)), the Section 416(e) definition of "child" is not tautological at all; it provides that the *legal* definition of "child" for purposes of the Act is the common English *dictionary* definition. As Judge Davis observed in his dissent from the Fourth Circuit's decision in *Schafer*, Congress's definition of the term "child" in Section 416(e) to include "a child" *and a range of other individuals* was "a kind of legislative shorthand" that "substitute[s] a single word or phrase as an abbreviation" for a complicated and "cumbersome list[]." *Schafer*, 641 F.3d at 65 (Davis, J., dissenting). Recognizing as much does not render the use of the word "child" in Section 416(e)(1) in any way "unclear," but instead simply requires a court to undertake the familiar interpretive task of determining whether a word as used by Congress applies in particular circumstances.[5]

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[5] "Like any word, the word 'child' comprises both a core of relations it clearly encompasses and a hazy periphery where

The government's second point, meanwhile, simply disregards the structure of the statute: Although professing to heed the statute's plain language, the government argues that, in using the words "as defined in section 416*(e)*," Congress actually meant to say "as defined in section 416*(h)*," a different statutory provision that uses an altogether different formulation. Yet the structure of the Act demonstrates that Congress intended Section 416(e) to stand alone without implicitly incorporating Section 416(h). As Judge Davis also noted, "Congress *specifically* invoked § 416(e)" in Section 402(d)(1) "and went on to *specifically* invoke § 416(h) in a neighboring provision," Section 402(d)(3), for a different purpose. *Schafer*, 641 F.3d at 64 (Davis, J., dissenting).

Section 402(d)(1)(C)(iii) provides that "[e]very child *(as defined in section 416(e) of this title)* * * * shall be entitled to a child's insurance benefit * * * ." 42 U.S.C. § 402(d)(1)(C)(iii) (emphasis added). Neither it nor Section 416(e) makes reference to Section 416(h)(2). But a different, and analytically distinct, provision in Section 402(d) *does* refer to the determination of "child" status described in Section 416(h)(2). In Section 402(d)(3), the Act provides that, "[f]or purposes of this paragraph, a child deemed to be a child of a fully or currently insured individual pursuant to *section 416 (h)(2)(B) or section 416 (h)(3)* of this title shall be deemed to be the legitimate child of such individual." 42 U.S.C. § 402(d)(3) (emphasis added). Thus, as Judge Davis noted, "[t]his is not a case in which we must choose between two competing statutory definitions, for here *Congress has chosen for us*." *Schafer*, 641 F.3d at 64 (Da-

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the label becomes increasingly contested." *Schafer*, 641 F.3d at 65 (Davis, J., dissenting).

vis, J., dissenting). In this setting, "it is difficult to imagine how Congress could have more clearly indicated that it understood the difference between the two definitions and was deliberately choosing to apply § 416(e)[]," and *not* Section 416(h), in setting the eligibility for benefits of children whose familial relationship with the wage earner is undisputed. *Ibid.*

3. An examination of the statute and its background also reveals the different circumstances in which Congress intended the two provisions to apply. Unlike Section 416(e), which defines the category of applicants entitled to survivor benefits when "child" status is undisputed, Section 416(h) (insofar as it applies to children) is a narrowly drawn provision that is relevant with respect only to determining the eligibility for benefits of certain children whose status as a dependent "child" is likely to be challenged or unclear. *Cf. McMillian* v. *Heckler*, 759 F.2d 1147, 1150 (4th Cir. 1985) ("An illegitimate claimant may establish that he is a 'child' for eligibility purposes under [§ 416(h)].").

Section 416(h)(2) covers an individual either (a) who has inheritance rights under state intestacy laws, or (b) whose parents were ostensibly married in a ceremony that was actually invalid by reason of a legal defect. Section 416(h)(3), in turn, covers individuals whose parentage has been established by a parent's written acknowledgement, a judicial decree, or some means other than marriage. Tellingly, the relevant Senate Report accompanying the 1965 amendment that enacted Section 416(h)(3) describes 416(h) as designed to determine the status only of "a child born out of wedlock." S. Rep. No. 89-404, at 109 (1965). This suggests, as Judge Davis put it, that "§ 416(h) was meant to be *additive*—extending bene-

fits to the children of unwed parents—rather than an attempt to supplant and, in places, narrow the scope of benefits promised by § 416(e)'s definition of 'child.'" *Schafer*, 641 F.3d at 67 (Davis, J., dissenting).

Section 402(d)(3)—the only provision of the Act that expressly invokes Sections 416(h)(2) and 416(h)(3)—supports this understanding of Section 416(h). To be eligible for survivor benefits under Section 402(d)(1), a qualifying child must be "dependent upon" the insured decedent. 42 U.S.C. § 402(d)(1)(C). Section 402(d)(3) deems a "child" covered by Section 402(d)(1) *per se* "dependent," except in limited circumstances, such as where a child does not live with the decedent parent *and* the child is born out of wedlock. Yet Section 402(d)(3) deems a child who is within the scope of Sections 416(h)(2)(B) and 416(h)(3) legitimate for purposes of this provision (even though, as a matter of fact, he or she may have been born outside of marriage). Thus, the children of unmarried parents who satisfy the terms of Sections 416(h)(2) and 416(h)(3) are entitled to the legal presumption of dependency, whereas that presumption is inapplicable to the children of unmarried parents who do not satisfy those terms. See *Gillett-Netting*, 371 F.3d at 598. It is in *that* context, and not in cases like this one, that Section 416(h) comes into play. See *id.* at 596-597.[6]

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[6] It is not surprising that Congress used different definitions in different sections of the Act. Section 416(h), which determines whether a child is a "dependent," naturally looks to state intestacy law; the aim of intestacy law, after all, is to support dependents. See, *e.g.*, *Matthews* v. *Lucas*, 427 U.S. 495, 514 (1976) ("[W]here state intestacy law provides that a child may take personal property from a father's estate, it may reasonably

4. In fact, it is the government's argument that the definition of "child" in Section 416(e) is controlled by Section 416(h)(2)(A) that would render the statutory definitions circular. Pet. 6-11. After instructing the Commissioner to apply state intestacy law "[i]n determining whether an applicant is a child," the last sentence of Section 416(h)(2)(A) provides that "[a]pplicants who according to [state intestacy] law would have the same status relative to taking intestate personal property *as a child* or parent shall be deemed such." 42 U.S.C. § 416(h)(2)(A) (emphasis added). This latter provision is meaningless unless the word "child" has independent force and is given its common English meaning. "One cannot reasonably compare a claimant's status under intestacy to the status of 'a child' until one settles on the definition of 'child.' Thus it makes little sense to abandon § 416(e)(1) on the ground that the word 'child' is vague in favor of § 416(h)(2)(A), which *also* requires an extraneous definition of 'child.'" *Schafer*, 641 F.3d at 66 (Davis, J., dissenting). The government's contrary understanding would render Section 416(h)(2)(A) *itself* nonsensical. See *W. Va. Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83, 101 (1991) (The goal when courts interpret statutes is to "make sense rather than nonsense out of the *corpus juris*").

In addition to being circular, the government's proposed application of Section 416(h) would in some instances make that provision either inconsistent or redundant with Section 416(e). For example, Section 416(e)(2) provides that a stepchild who had been a stepchild for "less than nine months immediately preceding the day on which [the insured] individual

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be thought that the child will more likely be dependent during the parent's life and at his death.").

died" should not have a right to receive survivor benefits under Section 402(d)(1). 42 U.S.C. § 416(e)(2). But in certain States, such as California, stepchildren may inherit from their stepparents regardless of the length of time that the stepchild-stepparent relationship has lasted. See Cal. Prob. Code § 6454. For applicants covered by such intestacy laws, the government's approach reads the applicable language of Section 416(e)(2) out of the statute.

The same type of problem arises with respect to Section 416(e)(3), which provides that grandchildren and stepgrandchildren qualify for survivor benefits only in certain limited circumstances. Under the intestacy laws of many States, however, grandchildren or stepgrandchildren whose parents predecease them inherit *automatically* from their grandparents or stepgrandparents. See, *e.g.*, Va. Code Ann. § 64.1-3 (West 2011). With respect to such applicants, Section 416(h)(2)(A) would displace the carefully defined limits drawn by Section 416(e)(3), leaving that lengthy subparagraph to accomplish nothing. These conflicts suggest not that "§ 416(h) somehow usurps § 416(e)," *Schafer*, 641 F.3d at 68 (Davis, J., dissenting), but that Congress meant to define two separate categories of potential beneficiaries.

B. The Decision Below Effectuates Congressional Intent.

The Third Circuit's reading of the statutory language is confirmed by looking to the clear policy behind the statute. The award of benefits to posthumously conceived children fits squarely within the central purpose of the Act, which is to protect families against the loss of income. And the Act's background and history shows that Congress intended the statute to be read broadly: In fact, all of the pro-

visions that the government relies upon to *restrict* benefits in this case were enacted by Congress specifically to *expand* survivor benefits, making them available to larger numbers of children. The government's reading would turn this statutory purpose on its head.

1. Through the Act, Congress and the President waged "a unified, well-rounded program of attack" to address the "principal causes of destitution and want" for American families—including the "loss of the wage earner of the family." S. Rep. No. 74-628, at 2. The Act promised "some safeguard against misfortunes which cannot be wholly eliminated in this man-made world of ours." H.R. Doc. No. 73-397, at 2. The legislation was intended to be a "broad program" to offer American families "security against the major hazards and vicissitudes of life." Address of the President of the United States, H.R. Doc. No. 74-01, at 3 (1935).

Congress further emphasized that "[a]ll parts of the [Act] are in a very real sense measures for the security of children." S. Rep. No. 74-628, at 16. "The heart of any program for social security must be the child." *Ibid.* At the time of initial enactment, the House committee focused particularly on "[o]ne clearly distinguishable group of children * * * for whom better provision should be made": children "in families lacking a father's support." H.R. Rep. No. 74-615, at 10 (1935). And committees in both the House and Senate emphasized the importance of financial aid to such families, so that "it is possible to keep the young children with their mother in their own home." S. Rep. No. 74-628, at 17. The enacted bill accordingly offered an annual appropriation of approximately $25 million to assist the States in offering relief to

"needy dependent children." Nat'l Res. Planning Bd., Security, Work and Relief Policies 83 (1942), *available at* http://tinyurl.com/4xhtq56.

Four years later, Congress revisited the issue after a 1938 report by the Advisory Council on Social Security concluded that "there is great need for further protection of dependent children." Final Report of the Advisory Council on Social Security, S. Doc. No. 76-04, at 18 (1938). The Council criticized the 1935 program as offering aid that was "insufficient to maintain normal family life or to permit the children to develop into healthy citizens." *Ibid.* Further, because of the technical cut-offs of the need-based program, "[m]any deserving cases are not able to obtain any aid." *Ibid.*

Among its reform recommendations, the Council proposed that dependent children and widows of a deceased wage earner receive survivor benefits as a matter of right. *Id.* at 17-18. The Council explained that such benefits would "sustain[] the concept that a child is supported through the efforts of the parent, [and] afford[] a vital sense of security to the family unit." *Id.* at 18. Congress ultimately approved the survivor benefits amendments to the Act, stating that the changes were "designed to afford more adequate protection to the family as a unit." H.R. Rep. No. 76-728, at 7.

2. In 1965, Congress again amended the Act to grant benefits to another class of children: those born out of wedlock who were unable to inherit property under state intestacy laws. As with the 1939 program, Congress focused its attention on eliminating obstacles to the Act's ultimate objectives—obstacles that excluded deserving children from the program

on the basis of technical cut-offs or archaic state intestacy rules. S. Rep. No. 89-404, at 109-110.

Although the Senate Committee that drafted this section did observe that "whether a child meets the definition of a child" depended upon state intestacy law, that one statement hardly proves the government's sweeping conclusion that "Congress understood—and agreed with—the proposition that * * * children who could not inherit under applicable state intestacy law were ineligible for survivor benefits." Pet. 13. To the contrary, Congress intended this provision to address the specific case of children born out of wedlock, for whom it might be difficult to establish paternity. But Congress *assumed* that the biological children of married parents were eligible for benefits: In its description of the disparate treatment States offered illegitimate children, the Senate Committee observed that "[i]n some States a child whose parents never married can inherit property *just as if they had married*." (emphasis added). S. Rep. No. 89-404, at 109.

The amendments sought to grant benefits for children in States with laws that were less generous to children born outside of marriage—children in a "normal family relationship" whose "friends and neighbors have [no] reason to think that *the parents were never married*." *Id.* at 110 (emphasis added). The bill was thus consistent with the Committee's belief that, "in a national program that is intended to pay benefits to replace the support lost by a child when his father retires, dies, or becomes disabled, *whether a child gets benefits should not depend on whether he can inherit his father's intestate personal property under the laws of the State in which his father happens to live*." *Ibid.* (emphasis added).

The Act's purpose clearly dictates eligibility for children like the Capato twins. As a law explicitly drafted "for the security of children," S. Rep. No. 74-628, at 16, the Act as applied to families in respondent's situation softens the impact of life's misfortunes—in this case, the primary wage-earner's untimely death. It offers a measure of security to the remaining family unit. It eases the expenses of keeping "the young children with their mother in their own home." *Id.* at 17. And it promises couples in the Capatos' circumstances that, when illness threatens their ability to have a family, the couple's plans for the future need not come to a halt. The ALJ recognized as much, finding that "[t]here is little doubt * * * that a favorable decision [for respondent] would not be inconsistent with the intention of the statute." Pet. App. 45a.

3. Lest there be any question about this, the decision below properly adhered to the "well-accepted principle that remedial legislation * * * is to be given a liberal construction consistent with the [statute's] overriding purpose." *United States* v. *Bacto-Unidisk*, 394 U.S. 784, 798 (1969).[7] The government urges ex-

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[7] The Court has applied this principle to a wide range of remedial statutes. See, *e.g.*, *Atchison, Topeka & Santa Fe Ry.* v. *Buell*, 480 U.S. 557, 569 (1987) (Federal Employers' Liability Act "recognized generally" as a "broad remedial statute" and thus given a "standard of liberal construction in order to accomplish [Congress's] objects"); *Clarke* v. *Sec. Indus. Ass'n*, 479 U.S. 388, 395 (1987) (Administrative Procedure Act should be construed not "grudgingly but as serving a broadly remedial purpose"); *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 268 (1977) (Longshoremen's and Harbor Workers' Compensation Act should be read liberally because "such a construction is appropriate for this remedial legislation"); *Tcherepnin* v. *Knight*, 389 U.S. 332, 336 (1967) (Securities

actly the opposite approach, proposing a reading that neither conforms "with [the Act's] purpose" nor "avoids harsh and incongruous results." *Voris* v. *Eikel*, 346 U.S. 328, 333 (1953).

In ruling for respondent, the Third Circuit followed the long-standing practice—uniform across the circuits—of applying the Act generously "'in consonance with its remedial and humanitarian aims.'" Pet. App. 5a (quoting *Eisenhauer* v. *Mathews*, 535 F.2d 681, 686 (2d Cir. 1976)); see also *Acierno* v. *Barnhart*, 475 F.3d 77, 81 (2d Cir. 2007) (describing the Act as "a remedial statute, to be broadly construed and liberally applied"); *Dorsey* v. *Bowen*, 828 F.2d 246, 248 (4th Cir. 1987) (determining that the Act should be broadly read "in favor of beneficiaries"). The courts of appeals are not, and have never been, split on this question: "In a close case, it is well to bear in mind that '[the Act's] intent is inclusion rather than exclusion * * * .'" *Cohen* v. *Sec'y of Dep't of Health & Human Serv.*, 964 F.2d 524, 531 (6th Cir. 1992) (quoting *Marcus* v. *Califano*, 615 F.2d 23, 29 (2d Cir. 1979)). Thus, for over seventy years, judicial practice has been to construe the Act in favor of coverage if it is reasonable to do so, not "so as to withhold benefits in marginal cases." *Smith* v. *Heckler*, 820 F.2d 1093, 1095 (9th Cir. 1987).

The rationale for that rule is plain: The Act "embrace[d] the broadest program for social security ever launched at one time by any government." H.R. Rep. No. 76-728, at 3. The courts interpret such statutes by "reading the whole statutory text, considering the purpose and context of the statute." *Dolan* v. *U.S.*

Exchange Act "should be construed broadly to effectuate its purposes").

Postal Serv., 546 U.S. 481, 486 (2006). Interpretation of the word "child" should thus accord with—and not frustrate—Congress's overriding vision for the Act. The decision below does just that.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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REPLY BRIEF

No. 11-159

In the Supreme Court of the United States

MICHAEL J. ASTRUE,
COMMISSIONER OF SOCIAL SECURITY, PETITIONER

v.

KAREN K. CAPATO, ON BEHALF OF B.N.C., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The court of appeals' erroneous rejection of the Social Security Administration (SSA)'s interpretation of Title II of the Social Security Act (the Act), 42 U.S.C. 401 *et seq.*, deepens a circuit conflict and warrants this Court's review. In administering child survivor benefits under the Act, the SSA has long interpreted 42 U.S.C. 416(h)(2)(A) according to its plain text, which provides that, in determining whether an applicant is the "child" of an insured wage earner who is eligible for benefits, the agency "shall apply such law as would be applied in determining the devolution of intestate personal property" in the State in which the wage earner was domiciled at the time of his or her death. This case involves children conceived after the death of their biological father. Because the applicable state law does not confer intestacy rights in that context, the SSA correctly deter-

mined that the children are not entitled to benefits. The court of appeals erred in setting aside that determination, and its decision contributes to a 2–2 circuit conflict that warrants resolution by this Court.

In opposing review, respondent argues that the judgment of the court of appeals is correct, that the circuit conflict does not require resolution, and that this case would be an inappropriate vehicle for resolving it. Those arguments lack merit.

A. The Decision Below Is Contrary To The Text, History, And Purposes Of The Social Security Act, And It Disregards The Agency's Reasonable Interpretation

Respondent devotes much of her brief (Br. in Opp. 15-29) to an attempt to defend the decision below. Even if she were successful, that would not make the question presented unworthy of review. But her efforts are unavailing.

1. Under 42 U.S.C. 402(d), "[e]very child (as defined in section 416(e) of this title) * * * of an individual who dies a fully or currently insured individual," is eligible for survivor benefits, provided that the child "was dependent upon such individual * * * at the time" of the individual's death, and provided that certain other requirements are met. Section 416(e) defines "child" to include "the child or legally adopted child of an individual." Although that provision does not further define "child," Section 416(h) identifies who qualifies: "In determining whether an applicant is the child * * * of a fully or currently insured individual for purposes of this subchapter, the Commissioner of Social Security shall apply such law as would be applied in determining the devolution of intestate personal property * * * by the courts of the State in which [the insured] was domiciled

at the time of his death." 42 U.S.C. 416(h)(2)(A). Thus, under Section 416(h)(2)(A), a posthumously conceived child who is ineligible to inherit personal property under state intestacy law is also ineligible for survivorship benefits.

In attempting to defend the court of appeals' contrary conclusion, which rests entirely on the word "child" in Section 416(e), respondent observes that "[i]n the absence of an indication to the contrary, words in a statute are assumed to bear their ordinary, contemporary, common meaning." Br. in Opp. 16-17 (quoting *Walters* v. *Metropolitan Educ. Enters., Inc.*, 519 U.S. 202, 207 (1997)). But Section 416(h) provides a clear "indication to the contrary" because it expressly states that in determining whether an applicant qualifies as a "child," for these purposes, the agency must look to state intestacy law. By contrast, respondent would look only to Section 416(e), the entire purpose of which is to define "child" as meaning something other than "child" —for example, to include certain grandchildren and stepchildren. In such a context, it makes little sense to invoke the "ordinary meaning" of "child."

Respondent contends (Br. in Opp. 19) that accepting the government's position would require believing that, "in using the words 'as defined in section 416(*e*),'" in Section 402(d), "Congress actually meant to say 'as defined in section 416(*h*).'" That is incorrect. In Section 402(d), Congress cross-referenced Section 416(e) in order to indicate that it was providing benefits to the grandchildren and stepchildren described in that provision. It did not need to cross-reference Section 416(h) because that provision, by its own terms, is already incorporated into Section 416(e)'s definition of "child."

2. Contrary to respondents' suggestion (Br. in Opp. 25-26), the decision below finds no support in the legislative history, which demonstrates that Congress understood Section 416(h) to apply to *all* applicants for benefits. Pet. 11-14. Respondent asserts that the Senate Report accompanying the 1965 amendments to the Act "describes [Section] 416(h) as designed to determine the status only of 'a child born out of wedlock.'" Br. in Opp. 20 (quoting S. Rep. No. 404, 89th Cong., 1st Sess. Pt. I, at 109 (1965) (*Senate Report*)). In fact, the quoted passage of the report stated that "the States differ considerably in the requirements that must be met in order for a child born out of wedlock to have inheritance rights." *Senate Report* 109. The purpose of that observation was to explain why Congress added Section 416(h)(3), which expands the definition of "child" to include certain children born out of wedlock. Its purpose was not to describe the scope of Section 416(h) as a whole, which had been part of the statute since 1939, and which makes clear that "child" status under the Act requires satisfaction of specified *legal* prerequisites, not merely biological ones. Nor is it surprising that Congress "*assumed* that the biological children of married parents were eligible for benefits" (Br. in Opp. 26), since every State provides intestacy rights to children under those circumstances. See 63 Fed. Reg. 57,591 (1998).

3. The decision below frustrates the purposes of Section 416(h). Although respondent attempts to address statutory purpose, she makes no mention of the traditional rule that questions of family status are to be resolved by state law, not federal law—a policy that is undermined by her reading of the statute. See Pet. 14. Instead, she argues (Br. in Opp. 27-28) that remedial legislation should be broadly construed to effect its pur-

poses. But her interpretation does little, if anything, to promote the remedial purpose of child survivor benefits, which is to "help[] those children who lost support after the unanticipated death of a parent." *Schafer* v. *Astrue*, 641 F.3d 49, 58 (4th Cir. 2011); see *id.* at 59 (suggesting that survivorship benefits for posthumously conceived children "would serve a purpose more akin to subsidizing the continuance of reproductive plans than to insuring against unexpected losses").

4. Even if respondent's reading of the statute were permissible, it is hardly compelled; the agency's contrary reading is, at a minimum, reasonable and entitled to deference. Pet. 16-17; see *Beeler* v. *Astrue*, 651 F.3d 954, 959-962 (8th Cir. 2011); *Schafer*, 641 F.3d at 60-62. Respondent's only answer to that point is the unsupported assertion (Br. in Opp. 17 n.4) that "[t]he word 'child' is not in the least ambiguous as it applies in the circumstances of this case." That argument overlooks that Section 416(h) expressly states that, for purposes of the relevant subchapter containing Section 416, whether an applicant qualifies as a "child" is determined by state intestacy law. At the very least, that language creates ambiguity as to the eligibility of applicants who lack state-law intestacy rights, notwithstanding Section 416(e)(1)'s statement that "'child' means * * * child." The agency's reasonable interpretation deserves deference.

B. The Question Presented Is Important And Warrants This Court's Review

1. As respondent acknowledges (Br. in Opp. 13), although the decision below accords with a decision of the Ninth Circuit, see *Gillett-Netting* v. *Barnhart*, 371 F.3d 593 (2004), it is directly contrary to the Fourth Cir-

cuit's decision in *Schafer*. In addition, after the petition was filed, the Eighth Circuit decided *Beeler*, in which it addressed the precise question presented here and held, in accord with the Fourth Circuit, that the Act "resolves the question of eligibility for child's insurance benefits by reference to state intestacy law." 651 F.3d at 966. On August 1, 2011, the Fourth Circuit denied a petition for rehearing en banc in *Schafer*, and on October 13, the time for filing a petition for rehearing in *Beeler* expired. Thus, there is no longer any possibility that the courts will reconsider their decisions in those cases, making it evident that the circuit conflict will not be resolved without this Court's intervention.

As noted in the petition (at 18-19), the decision below is also incompatible with the reasoning of *Javier* v. *Commissioner of Social Security*, 407 F.3d 1244 (D.C. Cir. 2005); *DeSonier* v. *Sullivan*, 906 F.2d 228 (6th Cir. 1990); and *Conlon ex rel. Conlon* v. *Heckler*, 719 F.2d 788 (5th Cir. 1983). Respondent is correct (Br. in Opp. 13 n.2) that there is no square conflict with those additional cases, but she does not deny the tension with their reasoning. In particular, *Conlon*'s holding that a claimant who "does not fit within the definition of a 'child'" under Section 416(h) "would not be considered a child under [S]ection 416(e)" makes clear that, if it were confronted with the question of posthumously conceived children, the Fifth Circuit would agree with the Fourth and Eighth Circuits, not with the court below. 719 F.2d at 800.

2. The circuit conflict concerning the nationwide program of child survivor benefits under the Social Security Act warrants this Court's review. That is especially so in light of the agency's observation—which respondent makes no effort to dispute—that the number

of applications for benefits for posthumously conceived children is increasing as the use of assisted reproductive technology becomes more widespread. Pet. 19.

Respondent asserts (Br. in Opp. 13-14) that the division among the circuits is not a matter "of pressing concern" because, under the government's interpretation, the statute incorporates state intestacy law, and therefore reversal of the decision below would not "lead to nationwide uniformity." Respondent's apparent premise is that disagreement about whether state or federal law applies in a particular context is not worthy of this Court's review, because if the rule of decision comes from state law, there will be non-uniformity in any event. But this Court frequently hears cases to resolve conflicts about whether to apply state or federal law as the rule of decision, such as under *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979), or *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938). The Court hears such cases to resolve divergent interpretations of *federal* law; the non-uniformity that results from the application of different *state* laws is a necessary consequence of a federal system. Here, the courts of appeals are evenly divided on the interpretation of a federal statute, and the effect of the decision below is to displace Congress's substantive judgment to make the determination of child status turn on state law, instead imposing a federal rule to govern that subject. This Court's review is appropriate.

Respondent also suggests (Br. in Opp. 14) that there is no need to resolve the disagreement among the circuits because "the government has had no evident difficulty dealing with" the approach of the Ninth Circuit and the court below, as demonstrated by its acquiescence in *Gillett-Netting* in cases arising in the Ninth

Circuit. But it is usually *possible* to apply a different rule in different circuits, and it is sometimes necessary for an agency to do so while a conflict remains unresolved. The prolonged continuation of that practice, however, is not conducive to the sound administration of a nationwide benefits program. The interests of both the agency and the program's beneficiaries would be better served by resolution of the uncertainty surrounding the question presented in this case.

C. This Case Is An Appropriate Vehicle For Resolving The Question Presented

Respondent argues that this case is an inappropriate vehicle for considering the question presented because the resolution of that question would not affect the ultimate disposition of the case. That is so, she says, for two reasons: First, she asserts that Mr. Capato "was domiciled in a State whose intestacy laws would allow [respondent's children] to recover from his estate," making them eligible for benefits even if the government were to prevail (Br. in Opp. 9), and, second, respondent suggests that her children might not have been "dependents" of Mr. Capato within the meaning of Section 402(d)(1)(C), making them ineligible for benefits even if the government were to lose (*id.* at 12). Neither argument provides a basis for denying review.

1. According to respondent, "there is substantial reason to believe" that Mr. Capato was not domiciled in Florida at the time of his death (Br. in Opp. 9), but rather was domiciled in California, Washington, or perhaps New Jersey (*id.* at 12). Respondent further asserts that those States, unlike Florida, would allow posthumously conceived children to inherit personal property by intestate succession, so that if Mr. Capato had

been domiciled in one of them, the children in this case would be entitled to benefits even under the government's interpretation of the statute. That argument lacks merit.

The administrative law judge expressly found that Mr. Capato "died domiciled in Florida." Pet. App. 40a. That finding is subject to substantial-evidence review, 42 U.S.C. 405(g), and under that standard, factual findings may be set aside only if the evidence compels a contrary conclusion, *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481 & n.1 (1992). The district court held that "[s]ubstantial evidence supports the ALJ's finding that the insured was domiciled in the State of Florida at the time of his death." Pet. App. 24a. And although the court of appeals found it unnecessary to reach the issue, it went out of its way to observe that "were we to decide the issue of domicile, we would likely conclude that it was Florida." *Id.* at 12a n.6. Accordingly, Mr. Capato's domicile is not the subject of any genuine "uncertaint[y]" in this case (Br. in Opp. 9).

Even if Mr. Capato's domicile were still open to further litigation, respondent's attacks on the ALJ's finding are meritless. Respondent does not dispute that Mr. Capato had resided in Florida for three years at the time of his death, and it is well settled that an individual's State of residence is presumed to be the State of his domicile. See *District of Columbia* v. *Murphy*, 314 U.S. 441, 455 (1941). A domicile is established by moving to a place with the intention to remain there, and it continues until the individual takes up residence in a different State with no fixed or definite plan to move elsewhere. See *Mississippi Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 48 (1989); *Berger* v. *Berger*, 210 F.2d 403, 405 (3d Cir. 1954). In light of Mr. Capato's

undisputed residence in Florida, the fact that he had previously "spent the vast majority of his life in California and Washington" (Br. in Opp. 9) is therefore irrelevant. Nor is it relevant that he had "plans to move to New Jersey" some day (*id.* at 10). There is no evidence that he arrived in Florida with a fixed and definite plan to leave, which means that Florida became his domicile upon his arrival. Indeed, even if he had arrived in Florida with a fixed and definite plan to leave, he would have retained his immediate prior domicile, which was Colorado, not California or Washington. Gov't C.A. Br. 26 n.4. And since he did not actually move to New Jersey, any plans that he might have had were insufficient to establish a domicile in that State.

2. Respondent also suggests that, even if her children are deemed to be Mr. Capato's "children" under Section 416, they may not have been "dependent" on him at the time of his death, as required by Section 402(d)(1)(C) for an award of benefits. According to respondent (Br. in Opp. 15), *Schafer* or *Beeler* would be better vehicles for this Court's review because the courts of appeals in those cases "came to a final conclusion on all relevant issues" when they ruled in favor of the government. That is incorrect. The Fourth Circuit in *Schafer* expressly declined to address the dependency issue, so if this Court were to grant review in that case and resolve the Section 416 issue against the government, the question of dependency would remain open. See 641 F.3d at 52 n.2 ("There is some question whether W.M.S. could satisfy § 402(d)(1)(C)(ii)'s dependency requirement, but * * * we need not resolve this issue."). Similarly, although the Eighth Circuit in *Beeler* relied on the agreement of the parties that if an applicant "qualifies as a 'child' under any provision of § 416(h),

then she will automatically satisfy the Act's dependency requirement," 651 F.3d at 959, it gave no indication of how it would evaluate dependency if—as suggested by respondent—an applicant could qualify as a "child" under Section 416(e) without satisfying Section 416(h).

In all events, whatever the ultimate outcome of the particular application for benefits at issue here, respondent does not deny that this case would provide a vehicle for the Court to consider an important question of statutory interpretation affecting the administration of the Social Security system. The possibility that respondent might ultimately be denied benefits on another ground would not prevent the Court from addressing the proper construction of Section 416. Indeed, the Court frequently considers cases that have been decided on one ground by a court of appeals, leaving other issues to be decided on remand, if necessary. See, *e.g.*, *Skinner* v. *Switzer*, 131 S. Ct. 1289, 1300 (2011); *Christian Legal Soc'y* v. *Martinez*, 130 S. Ct. 2971, 2995 n.28 (2010). The same course is appropriate here.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

OCTOBER 2011

PETITIONER'S BRIEF

No. 11-159

In the Supreme Court of the United States

MICHAEL J. ASTRUE,
COMMISSIONER OF SOCIAL SECURITY, PETITIONER

v.

KAREN K. CAPATO, ON BEHALF OF B.N.C., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether a child who was conceived after the death of a biological parent, but who cannot inherit personal property from that biological parent under applicable state intestacy law, is eligible for child survivor benefits under Title II of the Social Security Act, 42 U.S.C. 401 *et seq.*

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In the Supreme Court of the United States

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 631 F.3d 626. The opinion of the district court (Pet. App. 15a-32a) is unreported. The decision of the administrative law judge (Pet. App. 33a-47a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 2011. A petition for rehearing was denied on March 9, 2011 (Pet. App. 13a-14a). On May 27, 2011, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including July 7, 2011. On June 30, 2011, Justice Alito further extended the time to August 8, 2011, and the petition was filed on

that date. The petition for a writ of certiorari was granted on November 14, 2011. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

Pertinent provisions are set forth in an appendix to this brief. App., *infra*, 1a-16a.

STATEMENT

1. Title II of the Social Security Act (the Act), 42 U.S.C. 401 *et seq.*, provides retirement and disability benefits to insured wage earners. In 1939, Congress amended Title II to provide benefits to a deceased wage earner's surviving family members, including minor children, who were dependent on the wage earner before his or her death. Social Security Act Amendments of 1939, ch. 666, Tit. II, 53 Stat. 1362.

As relevant here, three statutory provisions now govern the availability of child survivor benefits. First, under 42 U.S.C. 402(d)(1), benefits are available to "[e]very child (as defined in section 416(e) of this title) of * * * an individual who dies a fully or currently insured individual," provided that the child has made an application for benefits, is a minor or is disabled, and was dependent on the deceased wage earner at the time of his or her death. 42 U.S.C. 402(d)(1). Second, Section 416(e) provides that "[t]he term 'child' means * * * the child or legally adopted child of an individual," and further provides that "child" means a "stepchild," "grandchild," or "stepgrandchild," so long as certain conditions are met. 42 U.S.C. 416(e)(1)-(3). Third, Section 416(h)(2)(A) directs that "[i]n determining whether an applicant is the child" of a deceased wage earner, "the Commissioner of Social Security shall apply such law as would be applied in determining the devolution of intestate personal prop-

erty by the courts of the State in which" the wage earner "was domiciled at the time of his death." 42 U.S.C. 416(h)(2)(A).[1]

2. In 1999, Robert Capato deposited sperm at a fertility clinic. He died in March 2002, and respondent, his widow, subsequently underwent in vitro fertilization using the frozen sperm. In September 2003, she gave birth to twins. Pet. App. 2a-3a.

Respondent applied for Social Security benefits on behalf of her children as survivors of a deceased wage earner. The Social Security Administration (SSA) denied the claim, and respondent requested a hearing before an Administrative Law Judge (ALJ). Pet. App. 3a.

The ALJ affirmed the denial of benefits. Pet. App. 33a-47a. Relying on Section 416(h)(2)(A), the ALJ reasoned that a child conceived after the death of his or her biological father can establish eligibility for benefits only by "showing that the child could inherit the wage earner's property as his child under the intestacy laws of the state where the wage earner was domiciled when he died." *Id.* at 39a. In this case, the ALJ found, Mr. Capato had been domiciled in Florida at the time of his death, and Florida's law of intestate succession permits children born after the death of a parent to inherit only if they were "conceived before his or her death, but born thereafter." *Id.* at 40a (quoting Fla. Stat. Ann. § 732.106 (West 2005)); see Fla. Stat. Ann. § 742.17(4) (West 2010).

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[1] Title II of the Act also provides for benefits to the children "of an individual entitled to old-age or disability insurance benefits." 42 U.S.C. 402(d)(1). For that reason, Section 416(h)(2)(A) provides for the determination of child status by reference to the laws of "the State in which such insured individual *is* domiciled" at the time of the application, if the insured wage earner is still alive. 42 U.S.C. 416(h)(2)(A) (emphasis added). This case involves only survivor benefits.

"Because the twins cannot inherit a child's share of the wage earner's personal property, under Florida's intestacy law," the ALJ concluded that "they do not qualify as the wage earner's 'children' under the Social Security Act." Pet. App. 41a.

The Social Security Appeals Council denied review, making the ALJ's decision the final agency decision. Pet. App. 16a; see 20 C.F.R. 404.955.

3. Respondent sought judicial review in the United States District Court for the District of New Jersey, and the district court affirmed the denial of benefits. Pet. App. 15a-32a. The court determined that "[s]ubstantial evidence supports the ALJ's finding that the insured was domiciled in the State of Florida at the time of death," and it agreed with the ALJ that, because posthumously conceived children are excluded from intestate succession under Florida law, respondent's children are ineligible for benefits under Section 416(h)(2)(A). *Id.* at 24a.

4. The court of appeals reversed. Pet. App. 1a-12a. Rejecting the agency's interpretation of the Act, the court held that Section 416(h)(2)(A)'s instruction to apply state intestacy law is applicable only in cases in which biological parentage is disputed. *Id.* at 10a. The court saw no reason "why, in the factual circumstances of this case, where there is no family status to determine, we would even *refer* to [Section] 416(h)." *Id.* at 7a. The court concluded that, under Section 416(e), "the undisputed biological children of a deceased wage earner and his widow [are] 'children' within the meaning of the Act," without regard to state intestacy law. *Id.* at 12a. The court therefore remanded "for a determination of whether, as of the date of Mr. Capato's death, his children were dependent or deemed dependent on him, the

final requisite of the Act remaining to be satisfied." *Ibid.*

SUMMARY OF ARGUMENT

The Social Security Administration has correctly interpreted the Social Security Act to provide that, in determining whether an applicant in the position of respondent's children is the "child" of an insured wage earner for the purpose of obtaining survivor benefits, the agency must apply state intestacy law. This case involves children conceived after the death of their biological father. Because the applicable state law would not confer intestacy rights in that context, the SSA correctly determined that the children are not entitled to survivor benefits under the Act. The contrary decision of the court of appeals is inconsistent with the text, history, and purposes of the Act, and it fails to give appropriate deference to the agency's interpretation of the statute.

Under 42 U.S.C. 402(d), "[e]very child (as defined in section 416(e) of this title) * * * of an individual who dies a fully or currently insured individual," is eligible for survivor benefits, provided that certain requirements are met. Section 416(e) defines "child" to include "the child or legally adopted child of an individual." Although that provision does not further define "child," Section 416(h) identifies who qualifies: "In determining whether an applicant is the child * * * of a fully or currently insured individual for purposes of this subchapter, the Commissioner of Social Security shall apply such law as would be applied in determining the devolution of intestate personal property * * * by the courts of the State in which [the insured] was domiciled at the time of his death." 42 U.S.C. 416(h)(2)(A). Thus, under Section 416(h)(2)(A), a posthumously conceived

child who is ineligible to inherit personal property under state intestacy law is also ineligible for survivor benefits.

The agency's interpretation of the Act is supported by legislative history demonstrating that when Congress amended Section 416(h) in 1965, it understood that provision to require all children to demonstrate intestacy rights under state law in order to be eligible for benefits. In amending Section 416(h) to extend eligibility to certain children who were born out of wedlock and for that reason lacked intestacy rights under some States' laws, Congress did not alter the role of Section 416(h) as the provision that governs the determination of child-parent relationships for the purposes of the Act.

Principles of federalism also support the agency's interpretation. Even in the context of federal programs, child-parent relationships are generally determined by state law, and nothing in the Act suggests that Congress intended to depart from that approach. By contrast, the court of appeals' approach not only requires the creation of a single federal rule that overrides state law, but also poorly serves the Act's basic purpose of replacing the unexpected loss of wages for a child's support. Posthumously conceived children fall outside the Act's core beneficiary class because they are brought into being by a surviving parent with the knowledge that the deceased biological parent will not be able to contribute wages for their support.

Even if the Act were susceptible to the interpretation adopted by the court of appeals, the court erred in failing to defer to SSA's wholly reasonable interpretation, which is reflected in published regulations first issued more than seventy years ago. That interpretation is entitled to deference under *Chevron U.S.A. Inc.* v.

NRDC, 467 U.S. 837 (1984), and the court identified no basis for disregarding it.

ARGUMENT

TO OBTAIN SOCIAL SECURITY BENEFITS AS THE CHILD OF A DECEASED WAGE EARNER, AN APPLICANT MUST DEMONSTRATE A CHILD-PARENT RELATIONSHIP WITH THE WAGE EARNER UNDER 42 U.S.C. 416(h)

A. The Text Of The Act Makes Clear That Section 416(h) Provides The Test For Determining An Applicant's Eligibility For Benefits As The "Child" Of A Deceased Wage Earner

1. In order to obtain child survivor benefits under the Social Security Act, an applicant must establish, among other things, that he or she is the child of a deceased wage earner. Under 42 U.S.C. 402(d), "[e]very child (as defined in section 416(e) of this title) * * * of an individual who dies a fully or currently insured individual," is eligible for survivor benefits, provided that the child "was dependent upon such individual * * * at the time" of the individual's death, and provided that certain other requirements not at issue here are met. 42 U.S.C. 402(d)(1). The definitions applicable to determining whether an applicant for survivor benefits qualifies as a "child" are set forth in 42 U.S.C. 416, entitled "Additional definitions." Subsection (e) of Section 416, referred to in Section 402(d)(1), states: "The term 'child' means (1) the child or legally adopted child of an individual, (2) a stepchild [under specified circumstances], and (3) a person who is the grandchild or stepgrandchild of an individual or his spouse, but only [under specified circumstances]." 42 U.S.C. 416(e). Section 416(e) goes on to provide a detailed definition of "legally adopted

child," but it does not further define the word "child" as used in Subsection (e)(1).

That further definition is supplied by Subsection (h) of Section 416, entitled "Determination of family status. As relevant here, Subsection (h)(2)(A) provides that, "[i]n determining whether an applicant is the child * * * of a fully or currently insured individual for purposes of this subchapter, the Commissioner of Social Security shall apply such law as would be applied in determining the devolution of intestate personal property * * * by the courts of the State in which [the insured] was domiciled at the time of his death." 42 U.S.C. 416(h)(2)(A). Subsections (h)(2)(B) and (3)(C) of Section 416 then describe three alternative ways in which an applicant who is the son or daughter of the insured wage earner, but who is not determined to be a "child" under Section 416(h)(2)(A), may nevertheless be "deemed" a child for purposes of Section 416(e)(1). See 42 U.S.C. 416(h)(2)(B) (applicant who is the son or daughter of the insured wage earner is deemed to be a "child" if the insured and the other parent went through a marriage ceremony that would have been valid but for certain legal impediments); 42 U.S.C. 416(h)(3)(C)(i) (applicant is deemed to be a "child" if, before death, the insured had acknowledged in writing that the applicant is his or her son or daughter, had been decreed by a court to be the father or mother of the applicant, or had been ordered to pay support because the applicant is his or her son or daughter); 42 U.S.C. 416(h)(3)(C)(ii) (applicant is deemed to be a "child" if the insured is shown by evidence satisfactory to the Commissioner to be the applicant's father or mother, and the insured was living with or supporting the applicant at the time of the insured's death).

The court of appeals did not dispute that the applicants here—who were conceived after the death of their biological father—do not qualify as his "children" under any of the four categories specified in Section 416(h)(2) and (3). In particular, the court acknowledged that they do not qualify under Section 416(h)(2)(A) because the law of Florida—the State in which Mr. Capato was domiciled at the time of his death—would not recognize them as his children for purposes of intestate succession. Pet. App. 7a; see Fla. Stat. Ann. § 742.17(4) (West 2010) ("A child conceived from the eggs or sperm of a person or persons who died before the transfer of their eggs, sperm, or preembryos to a woman's body shall not be eligible for a claim against the decedent's estate unless the child has been provided for by the decedent's will."). Accordingly, the court of appeals should have affirmed the Social Security Administration's determination that respondent's children are not eligible for survivor benefits based on Mr. Capato's earnings record.

2. The court of appeals nevertheless reversed the SSA's eligibility determination. It did so by effectively engrafting onto the statute an amorphous fifth category of eligibility, covering applicants who are the "undisputed biological children" of deceased wage earners. Pet. App. 10a. The court made little effort to anchor that position to the text of the statute, other than to make clear that it is *not* based on Section 416(h). *Id.* at 11a ("[W]e do not read [Sections] 402(d) or 416(e) as requiring reference to [Section] 416(h) to establish child status."). But neither Section 402(d)(1) nor Section 416(e)—nor, for that matter, Section 416(h)(2) or (3)—uses the term "undisputed biological child[]" or "biological child" in defining whether an applicant quali-

fies as a "child." And there is no basis in the Act for adding to Section 416(h)(2) and (3)'s carefully drawn list of situations in which an applicant qualifies as a "child" for purposes of Section 416(e)(1). To the contrary, the mandatory language of Section 416(h)(2)(A)—"[i]n determining whether an applicant is the child * * * the Commissioner * * * *shall* apply such law," 42 U.S.C. 416(h)(2)(A) (emphasis added)—demonstrates that the test set out in that provision is exclusive where, as here, the alternative tests in Section 416(h)(2)(B) and (3)(C) are not satisfied.

3. In reaching a contrary conclusion, the court of appeals placed great weight on the word "child" in Section 416(e). The court cited *Walters* v. *Metropolitan Educational Enterprises, Inc.*, 519 U.S. 202 (1997), in which this Court stated that, "[i]n the absence of an indication to the contrary, words in a statute are assumed to bear their 'ordinary, contemporary, common meaning,'" *id.* at 207 (quoting *Pioneer Inv. Servs. Co.* v. *Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 388 (1993)); Pet. App. 10a. But Section 416(h) provides a clear "indication to the contrary" because it expressly states that in determining whether an applicant qualifies as a "child," for purposes of eligibility for benefits under Title II of the Social Security Act, the agency must look to state intestacy law. By contrast, the court of appeals looked only to Section 416(e). That provision, however, defines "child" as meaning something *other* than "child" in the strictly biological sense respondent urges—for example, by expanding the eligibility categories to include certain grandchildren and stepchildren. In such a context, it makes little sense to invoke the "ordinary meaning" of "child." Rather, as Section 416(e) and Section 416(h) make clear, "child" is a term of art under the

Act that describes the *legal* relationship the applicant must have to the insured in order to be eligible for benefits.

The court of appeals saw no need to refer to Section 416(h) because, in its view, the text of Section 416(e) "is so clear." Pet. App. 10a. As the Fifth Circuit has observed, however, the "definitional tautology" in Section 416(e)—*i.e.*, "a 'child' is a child"—"does not provide much guidance" in determining whether an applicant qualifies as the child of a deceased wage earner as a legal matter. *Conlon ex rel. Conlon* v. *Heckler*, 719 F.2d 788, 800 (1983); cf. *United States* v. *Bestfoods*, 524 U.S. 51, 56, 66 (1998) (describing the definition of "owner or operator" in the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601(20)(A)(ii) ("any person owning or operating such facility"), as a "tautology" that is "useless[]" in construing the statute). Indeed, "it is not clear just how the SSA *could* give 'full meaning' to the statutory proposition that 'a "child" is a child' without help from neighboring provisions." *Schafer* v. *Astrue*, 641 F.3d 49, 56 (4th Cir. 2011). Even the court of appeals acknowledged that it is easy to imagine cases in which the determination of biological parentage is complex. Pet. App. 11a (noting that "[t]he use of donor eggs, artificial insemination, and surrogate wombs could result in at least five potential parents") (quoting Gov't C.A. Br. 36). As the Fourth Circuit correctly concluded, "it [is] very unlikely Congress would have left the SSA so utterly in the dark about such a critical term." *Schafer*, 641 F.3d at 55. And, in fact, Congress did not do so. Its "more comprehensive effort[]" to supply a definition in Section 416(h) provides a "plain and explicit instruction on how the determination of child status should be made." *Id.* at 54.

That does not mean that Section 416(e) is superfluous. To the contrary, Section 416(e)(1) clarifies that both natural children and legally adopted children are eligible for benefits; Section 416(e)(2) includes certain stepchildren; and Section 416(e)(3) includes even certain grandchildren and stepgrandchildren. The inclusion of those potential beneficiaries "importantly expands the scope of the Act and distinguishes it from narrower benefits programs." *Schafer*, 641 F.3d at 56; cf. *Cleland* v. *OPM*, 984 F.2d 1193, 1195 (Fed. Cir. 1993) (holding that grandchildren are not entitled to survivorship benefits under the civil-service retirement program, 5 U.S.C. 8341(e)(2), because they are not specifically identified in that statute).[2]

Nor is the court of appeals' interpretation compelled, or even supported, by Section 402(d)'s cross-reference to Section 416(e). That cross-reference serves, *inter alia*, to clarify that the Act provides benefits to the grandchildren and stepchildren described in the provision. There is no need for Section 402(d) to cross-reference Section 416(h) in addition because that provision, by its own terms, is already incorporated into Section 416(e)(1)'s definition of "child." Section 416(h)(2)(A) plainly states that the Commissioner "shall" apply state intestacy law in determining whether an applicant is a child "for purposes of this subchapter"—that is, for purposes of the subchapter in which Section 416(e) is lo-

[2] Section 416(h)(2)(A)'s rule for determining child status governs only status as a "child" under Section 416(e)(1), not a legally adopted child, stepchild, grandchild, or stepgrandchild of a deceased wage earner as defined in Section 416(e)(2) and (3). The SSA sometimes uses the term "natural child" to distinguish applicants seeking benefits as a Subsection (e)(1) "child" from applicants seeking benefits as an adopted child, stepchild, grandchild, or stepgrandchild. See, *e.g.*, 20 C.F.R. 404.354, 404.355; pp. 23-24, *infra*.

cated. As the Eighth Circuit has explained, "[i]f natural 'child' in [Section] 416(e) is further defined by [Section] 416(h), then Congress can incorporate the definitional provisions of [Section] 416(h) without an explicit cross-reference to that subsection. It is reasonable for the Commissioner to conclude that [Section] 402(d)(1)'s cross-reference to [Section] 416(e) picks up all subsidiary provisions that flow back through [Section] 416(e)." *Beeler* v. *Astrue*, 651 F.3d 954, 963 (2011), petition for cert. pending, No. 11-667 (filed Nov. 23, 2011); see *Schafer*, 641 F.3d at 56 (observing that "it is not at all unusual for Congress to refer explicitly only to one section even though some of that section's terms are given their full import by another, unmentioned section").

Congress took a similar approach in other provisions of Title II. Section 402(b) provides benefits to "[t]he wife (as defined in section 416(b) of this title) * * * of an individual entitled to old-age or disability insurance benefits," if certain conditions are satisfied, 42 U.S.C. 402(b)(1), and Section 402(c) similarly provides benefits to "[t]he husband (as defined in section 416(f) of this title) * * * of an individual entitled to old-age or disability insurance benefits," 42 U.S.C. 402(c)(1). Likewise, Section 402(e) provides benefits to "[t]he widow (as defined in section 416(c) of this title) * * * of an individual who died a fully insured individual," 42 U.S.C. 402(e)(1), and Section 402(f) similarly provides benefits to "[t]he widower (as defined in section 416(g) of this title) * * * of an individual who died a fully insured individual," 42 U.S.C. 402(f)(1). Like Section 416(e), the cited definitional provisions are, at least in part, tautological. See, *e.g.*, 42 U.S.C. 416(b) ("The term 'wife' means the wife of an individual, but only" under certain conditions.). And although none of those sections con-

tains an express cross-reference to Section 416(h), that provision's rules for the "[d]etermination of family status" govern the application of all of them. See 42 U.S.C. 416(h)(1)(A)(i) (looking to state law to determine when "[a]n applicant is the wife, husband, widow, or widower of a fully or currently insured individual").

4. The court of appeals' view that Section 416(h) has "no relevance" where a biological relationship is established, Pet. App. 8a (quoting *Gillett-Netting* v. *Barnhart*, 371 F.3d 593, 596 (9th Cir. 2004)), is contrary to the statutory text and renders several other provisions of Section 416(h) superfluous. But see *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.") (internal quotation marks omitted). Section 416(h)(2)(B) and (3)(C) provide that an applicant who is ineligible to inherit under state law may nevertheless be deemed a "child" if he or she "is the son or daughter of [the] insured" and satisfies certain other criteria. 42 U.S.C. 416(h)(2)(B) and (3)(C). The terms "son" and "daughter," which are not otherwise defined in the Act, refer to an applicant who is the natural (biological) child of the insured. But that biological relationship is not alone enough to qualify; the applicant must satisfy additional criteria. If being an "undisputed biological child[]" were sufficient for eligibility, then none of those provisions would serve any purpose, since each of them applies only to applicants who are the biological children ("sons" and "daughters") of insured wage earners but who must also satisfy additional criteria. See *Beeler*, 651 F.3d at 963 (The SSA's interpretation of the Act "is fortified by the fact that Congress elsewhere

required proof beyond undisputed biological parentage to obtain 'child' status under [Section] 416(e)."); *Schafer*, 641 F.3d at 55 ("Congress would not have imposed an additional proof requirement on these undisputed children if undisputed biological parentage sufficed under [Section] 416(e)(1)."). Because Section 416(h)(2)(B) and (3)(C) apply to a son or daughter who does not qualify as a "child" under Section 416(h)(2)(A), the latter provision necessarily applies to biological children as well.

The court of appeals' interpretation of the Act is further refuted by Section 416(h)(1)(A). As explained above, that provision instructs the Commissioner to look to state law to determine whether an applicant is eligible for benefits as the wife, husband, widow, or widower of the insured. Under that provision, the applicant is eligible if the courts of the State where the insured was domiciled would find that the applicant and insured were married; and failing that, the applicant shall "nevertheless" be "deemed" to be the wife, husband, widow, or widower if the courts of that State, in determining the devolution of intestate personal property, would accord the applicant the same status as a wife, husband, widow, or widower. 42 U.S.C. 416(h)(1)(A)(ii). Thus, as the heading to Section 416(h) ("Determination of family status") makes clear, the tests in Section 416(h)(1), (2) and (3) are intended to be used in *all* cases to determine whether the requisite family status is established as a legal matter. 42 U.S.C. 416(h). The court of appeals erred in refusing to apply the plain terms of that provision.

B. Legislative History Confirms That The Applicant Must Establish A Legal Relationship With The Deceased Wage Earner Under Section 416(h)

In departing from the text of Section 416(h), the court of appeals relied in part on its understanding of the legislative history of that provision. The court adopted the reasoning of the Ninth Circuit's decision in *Gillett-Netting* that language in Section 416(h)(2) and (3) was "added to the Act [in 1965] to provide various ways in which children could be entitled to benefits even if their parents were not married or their parentage was in dispute." Pet. App. 8a (quoting *Gillett-Netting*, 371 F.3d at 596). Because the text of the Act is clear, there was no occasion for recourse to legislative history. See *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 240-241 (1989) ("[A]s long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute."). In any event, the Ninth Circuit's view of the 1965 amendments was "simply wrong." *Schafer*, 641 F.3d at 57.

As enacted in 1939, the child survivor provisions of the Social Security Act were similar in structure to the current law. They contained a provision granting benefits to every "child," see 42 U.S.C. 402(c)(1) (1940); a provision paralleling the current definition of "child," see 42 U.S.C. 409(k) (1940) ("The term 'child' * * * means the child of an individual," as well as certain stepchildren and adopted children.); and a provision paralleling the current versions of Section 416(h)(1)(A) and (2)(A), see 42 U.S.C. 409(m) (1940) ("In determining whether an applicant is the wife, widow, *child*, or parent of a fully insured or currently insured individual for purposes of sections 401-409 of this title, the Board shall

apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which such insured individual is domiciled * * * or * * * in which he was domiciled at the time of his death.") (emphasis added). Under those provisions, the only way *any* son or daughter (or wife, widow, or parent) could be eligible for benefits was by establishing that he or she would have been able to inherit from the insured wage earner under state intestacy law.

In 1965, Congress amended the Act to broaden eligibility for child survivor benefits by adding Section 416(h)(3)(C). See Old-Age, Survivors, and Disability Insurance Amendments of 1965, Pub. L. No. 89-97, § 339, 79 Stat. 409.[3] The Senate Report accompanying those amendments made clear Congress's understanding that "whether a child meets the definition of a child for the purpose of getting child's insurance benefits based on his father's earnings depends on the laws applied in determining the devolution of intestate personal property in the State in which the worker is domiciled." S. Rep. No. 404, 89th Cong., 1st Sess. Pt. 1, at 109 (1965) (Senate Report). The Committee went on to observe that "States differ considerably in the requirements that must be met in order for a child born out of wedlock to have inheritance rights." *Ibid.* In that context, some States prohibited intestate succession altogether, while others were more generous. *Id.* at 109-110. Indeed, several courts of appeals had affirmed the denial of survivor benefits to the undisputed children of a deceased wage earner because the children were born out of wedlock and thus had no intestacy rights under applicable

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[3] Section 416(h)(2)(B) was added by the Social Security Amendments of 1960, Pub. L. No. 86-778, § 208(b) and (d), 74 Stat. 924, 951-952. See *Mathews* v. *Lucas*, 427 U.S. 495, 515 n.17 (1976).

state law. See, *e.g.*, *Gainey* v. *Flemming*, 279 F.2d 56 (10th Cir. 1960) (applying Colorado law); *Robles* v. *Folsom*, 239 F.2d 562 (2d Cir. 1956) (applying New York law), cert. denied, 353 U.S. 960 (1957); *Hobby* v. *Burke*, 227 F.2d 932 (5th Cir. 1955) (applying Georgia law).

The Committee explained that in order to provide greater uniformity in the provision of benefits, the amendments provided for the eligibility of children who could not inherit under state law, "if the father had acknowledged the child in writing, had been ordered by a court to contribute to the child's support, had been judicially decreed to be the child's father, or is shown by other evidence satisfactory to the Secretary of Health, Education, and Welfare to be the child's father and was living with or contributing to the support of the child." Senate Report 110. Those amendments are now codified in Section 416(h)(3)(C). Importantly, neither the amendments themselves nor their legislative history suggest any intention to change the Act's well-established requirement that an indisputably natural "child" under Section 416(e)(1) must establish a child-parent relationship with the deceased wage earner as a legal matter under Section 416(h).

The history of the 1965 amendments demonstrates that Congress understood—and agreed with—the proposition that under the pre-1965 version of the Act, children who could not inherit under applicable state intestacy law were ineligible for survivor benefits. In amending Section 416(h) to broaden eligibility for benefits, Congress did not alter the role of Section 416(h) as the provision that governs the determination of family status, including an applicant's status as a "child." Instead, it added alternative mechanisms to Section 416(h) under which a son or daughter who could not inherit under

state intestacy law could nonetheless establish the requisite child-parent relationship. As the Fourth Circuit correctly concluded, "[t]he Act's legislative history could hardly be clearer" in establishing that "Congress understood the Act's framework as requiring all natural children to pass through [Section] 416(h) to claim child status." *Schafer*, 641 F.3d at 58; accord *Beeler*, 651 F.3d at 964.

C. The SSA's Interpretation Of The Act Is Consistent With Principles Of Federalism And Promotes The Statutory Purpose

1. Even in the context of federal programs, child-parent relationships are generally determined by state law. See *Mansell* v. *Mansell*, 490 U.S. 581, 587 (1989) ("Because domestic relations are preeminently matters of state law, we have consistently recognized that Congress, when it passes general legislation, rarely intends to displace state authority in this area."); see also *United States* v. *Morrison*, 529 U.S. 598, 615 (2000) (identifying "family law" as a field of "traditional state regulation"); *Schafer*, 641 F.3d at 62 ("Congress's efforts toward cooperative federalism here are hardly surprising. Family and inheritance law fall squarely within the states' historic competence."). As this Court has explained, "[t]he word 'children,' although it to some extent describes a purely physical relationship, also describes a legal status," which "requires a reference to the law of the State which create[s] those legal relationships." *De Sylva* v. *Ballentine*, 351 U.S. 570, 580 (1956). The Act contains nothing to suggest that Congress wished to depart from its usual practice by displacing state law and creating a federal rule governing parent-child relationships. To the contrary, Section 416(h)(2)(A) directs precisely the opposite.

2. Section 416(h)(2)(A)'s incorporation of state intestacy law rests not only on principles of federalism but also on the congressional judgment that, because survivor benefits are designed to provide support to survivors from the insured's Social Security wage account, state intestate-succession laws provide a sound guide in determining eligibility. This Court has explained, in discussing the "child" benefit provisions of the Act, that as a general matter, "where state intestacy law provides that a child may take personal property from a [parent's] estate, it may reasonably be thought that the child will more likely be dependent during the parent's life and at his death." *Mathews* v. *Lucas*, 427 U.S. 495, 514 (1976).

In holding that the biological relationship between a posthumously conceived child and the deceased biological parent is sufficient, by itself, to establish the requisite child-parent relationship for benefits purposes under Title II of the Act, the court of appeals adopted a rule that is broader than that adopted by any State in legislation directly addressing the question of posthumous conception. See, *e.g.*, Ala. Code § 26-17-707 (LexisNexis 2009); Cal. Prob. Code § 249.5 (West Supp. 2011); Colo. Rev. Stat. § 19-4-106(8) (2011); Del. Code Ann. tit. 13, § 8-707 (2009); Fla. Stat. Ann. § 742.17(4) (West 2010); La. Rev. Stat. Ann. § 9:391.1 (West 2008); N.M. Stat. § 40-11A-707 (Supp. 2011); N.D. Cent. Code § 14-20-65 (2009); Tex. Fam. Code Ann. § 160.707 (Vernon 2008); Utah Code Ann. § 78B-15-707 (2008); Va. Code Ann. § 20-158 (2008); Wash. Rev. Code Ann. § 26.26.730 (West 2005); Wyo. Stat. Ann. § 14-2-907 (2011) (all either excluding posthumously conceived children from intestate succession, or limiting the inheritance rights of such children to situations in which the deceased parent consented in a record to posthumous

conception); see Unif. Parentage Act § 707 (amended 2002), 9B U.L.A. 73 (Supp. 2011) (a deceased individual is not a "parent" of a posthumously conceived child unless the individual "consented in a record that if assisted reproduction were to occur after death, the deceased individual would be a parent of a child"); Unif. Probate Code § 2-120(k) (amended 2008), 8 U.L.A. 58 (Supp. 2011) (treating a posthumously conceived child as "in gestation at the individual's death," but only if certain time limits are met).

If Congress wishes to adopt a broad rule like that announced by the court below and by the Ninth Circuit, it has the authority to do so. But in light of the many complexities arising from rapid technological change in this area, the Act thus far leaves the matter to applicable state law, just as it left the eligibility of a child born out of wedlock to state law prior to the 1965 amendments that enacted additional ways in which such a child could qualify. While the SSA's interpretation respects Congress's choice by giving effect to Section 416(h)(2)(A)'s reference to state law, the court of appeals' position would force the agency and the federal courts to create a federal common law of parental relationships in the context of posthumously conceived children. That enterprise has no basis in the Act.

3. Extending eligibility to children who were conceived after the death of a parent is not only inconsistent with principles of federalism, but also is poorly tailored to "the Act's basic aim of primarily helping those children who lost support after the unanticipated death of a parent." *Schafer*, 641 F.3d at 58; see *Lucas*, 427 U.S. at 507 (observing that the Act is "not a general welfare provision for legitimate or otherwise 'approved' children of deceased insureds, but was intended just to replace

the support lost by a child when his father dies") (internal quotation marks and ellipses omitted). By definition, posthumously conceived children are brought into being by a surviving parent with the knowledge that the deceased biological parent will not be able to contribute wages for the child's support. The court of appeals' approach thus "serve[s] a purpose more akin to subsidizing the continuance of reproductive plans than to insuring against unexpected losses." *Schafer*, 641 F.3d at 59. Indeed, although this case involves a deceased father who was married to the children's mother, the logic of the court of appeals' decision would be equally applicable to children conceived by means of sperm from an anonymous donor who was insured under the Act, who happened to die before conception, but who was later identified.

Moreover, because the Act caps the total amount of benefits payable on a single earnings record, treating all posthumously conceived children as eligible for benefits could result in a reduction of benefits for other pre-existing children of the wage earner. See 42 U.S.C. 403(a)(1); 20 C.F.R. 404.403. In that respect, the court of appeals' approach threatens the interests of the Act's "core beneficiary class: the children of deceased wage earners who relied on those earners for support." *Schafer*, 641 F.3d at 58.

D. The SSA's Interpretation Of The Act Is Entitled To Deference

Even if the Act were susceptible to the interpretation adopted by the court of appeals, the court erred in disregarding the SSA's longstanding interpretation of the statute to the contrary, which is entitled to deference. Because the agency's position is, at a minimum, reasonable, it should be upheld.

1. The agency's longstanding position has been that the determination under Section 416(h) of whether an applicant who is the natural or biological child of the insured wage earner is eligible for benefits as the "child" of the deceased wage earner governs the meaning of "child" in Section 416(e)(1), and thus Section 402(d)(1). In a regulation that parallels Section 416(e), the SSA has explained that an applicant "may be related to the insured person in one of several ways and be entitled to benefits as his or her child, *i.e.*, as a *natural child*, legally adopted child, stepchild, grandchild, stepgrandchild, or equitably adopted child." 20 C.F.R. 404.354 (emphasis added). Subsequent provisions address each of those categories of eligibility. See 20 C.F.R. 404.355-404.359. As relevant here, 20 C.F.R. 404.355 (entitled "Who is the insured's natural child?") explains that an applicant "may be eligible for benefits as the insured's *natural child* if any of the following conditions is met," and it then lists four conditions, the first of which is that the applicant "could inherit the insured's personal property as his or her *natural child* under State inheritance laws." 20 C.F.R. 404.355(a)(1) (emphasis added); see 42 U.S.C. 416(h)(2)(A). The remaining three conditions—all of which likewise refer to the insured's "natural child"—are those described in Section 416(h)(2)(B) and(3)(C), namely, that the insured and the other parent "went through a ceremony which would have resulted in a valid marriage between them except for a 'legal impediment,'" 20 C.F.R. 404.355(a)(2), see 42 U.S.C. 416(h)(2)(B); that, before death, the insured had acknowledged paternity in writing, been decreed by a court to be a parent, or been ordered to pay child support, 20 C.F.R. 404.355(a)(3), see 42 U.S.C. 416(h)(3)(C)(i); or that it is shown by evidence satisfac-

tory to the Commissioner that the insured was the applicant's parent, and the insured was living with or supporting the applicant at the time of the insured's death, 20 C.F.R. 404.355(a)(4); see 42 U.S.C. 416(h)(3)(C)(ii).

Thus, as the Eighth Circuit recognized, the SSA's "regulations make clear that the * * * provisions of [Section] 416(h) are the exclusive means by which an applicant can establish 'child' status under [Section] 416(e) as a natural child." *Beeler*, 651 F.3d at 960-961. The agency's regulations articulating that interpretation date back to 1940, the year after Congress first added child survivor benefits to the Act. See 5 Fed. Reg. 1880 (May 23, 1940) ("A son or daughter (*by blood*) of a wage earner, who is the child of such wage earner or has the same status as a child, *under applicable State law*, is the 'child' of such wage earner.") (citation omitted, emphasis added) (20 C.F.R. 403.832(a) (Cum. Supp. 1943)); accord 20 C.F.R. 404.1101 (Supp. 1960); 20 C.F.R. 404.1109 (Supp. 1960). Significantly, that interpretation was well settled in 1965 when Congress amended Section 416(h), but Congress did nothing to disturb it. See *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.").

The agency's consistent and longstanding interpretation of the statute is set out in published regulations that are the product of notice-and-comment rulemaking and were issued under the Commissioner's authority to promulgate rules that are "necessary or appropriate to carry out" his functions and the relevant statutory provisions. See 42 U.S.C. 405(a), 902(a)(5). The agency's interpretation therefore is entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). See

Barnhart v. *Walton*, 535 U.S. 212, 217-222, 225 (2002) (deferring to the Commissioner's "considerable authority" to interpret the Social Security Act).

2. Even if the SSA's regulations were themselves ambiguous, the agency has resolved any ambiguity through published guidance that specifically addresses the eligibility of posthumously conceived children for survivor benefits. Because posthumously conceived children are categorically unable to establish a child-parent relationship under Section 416(h)'s alternative mechanisms (all of which require that an action by the deceased wage earner or a court while the wage earner was still alive), the agency's Program Operations Manual System (POMS) explains that "[a] child conceived by artificial means after the [insured's] death" is entitled to benefits only "if he or she has inheritance rights under applicable State intestacy law." SSA, POMS GN 00306.001(C)(1)(c), http://policy.ssa.gov/poms.nsf/lnx/0200306001; see 70 Fed. Reg. 55,656, 55,657 (Sept. 22, 2005) ("[T]o meet the definition of 'child' under the Act, an after-conceived child must be able to inherit under State law.").

The POMS provision reflects the SSA's interpretation of both the Act and the agency's regulations implementing it. See POMS GN 00306.001 (citing 42 U.S.C. 402(d), 416(e), (h)(2) and (3), as well as 20 C.F.R. 404.350-404.366). To the extent that the provision reflects an interpretation of the statute, it is entitled at least to deference under *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 139-140 (1944). See *Washington State Dep't of Soc. & Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U.S. 371, 385-386 (2003) (according deference to a provision of the POMS). And to the extent it reflects an interpretation of the SSA's own regulations, it is entitled

to even greater deference under *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997). See *Talk America, Inc.* v. *Michigan Bell Tel. Co.*, 131 S. Ct. 2254, 2261 (2011).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. 42 U.S.C. 402 provides, in pertinent part:

Old-age and survivors insurance benefit payments

* * * * *

(d) Child's insurance benefits

(1) Every child (as defined in section 416(e) of this title) of an individual entitled to old-age or disability insurance benefits, or of an individual who dies a fully or currently insured individual, if such child—

(A) has filed application for child's insurance benefits,

(B) at the time such application was filed was unmarried and (i) either had not attained the age of 18 or was a full-time elementary or secondary school student and had not attained the age of 19, or (ii) is under a disability (as defined in section 423(d) of this title) which began before he attained the age of 22, and

(C) was dependent upon such individual—

(i) if such individual is living, at the time such application was filed,

(ii) if such individual has died, at the time of such death, or

(iii) if such individual had a period of disability which continued until he became entitled to old-age or disability insurance benefits, or (if he has died) until the month of his death, at the beginning of

such period of disability or at the time he became entitled to such benefits,

shall be entitled to a child's insurance benefit for each month, beginning with—

(i) in the case of a child (as so defined) of such an individual who has died, the first month in which such child meets the criteria specified in subparagraphs (A), (B), and (C), or

(ii) in the case of a child (as so defined) of an individual entitled to an old-age insurance benefit or to a disability insurance benefit, the first month throughout which such child is a child (as so defined) and meets the criteria specified in subparagraphs (B) and (C) (if in such month he meets the criterion specified in subparagraph (A)),

whichever is earlier, and ending with the month preceding whichever of the following first occurs—

(D) the month in which such child dies or marries,

(E) the month in which such child attains the age of 18, but only if he (i) is not under a disability (as so defined) at the time he attains such age, and (ii) is not a full-time elementary or secondary school student during any part of such month,

(F) if such child was not under a disability (as so defined) at the time he attained the age of 18, the earlier of—

(i) the first month during no part of which he is a full-time elementary or secondary school student, or

(ii) the month in which he attains the age of 19,

but only if he was not under a disability (as so defined) in such earlier month;

(G) if such child was under a disability (as so defined) at the time he attained the age of 18 or if he was not under a disability (as so defined) at such time but was under a disability (as so defined) at or prior to the time he attained (or would attain) the age of 22—

(i) the termination month, subject to section 423(e) of this title (and for purposes of this subparagraph, the termination month for any individual shall be the third month following the month in which his disability ceases; except that, in the case of an individual who has a period of trial work which ends as determined by application of section 422(c)(4)(A) of this title, the termination month shall be the earlier of (I) the third month following the earliest month after the end of such period of trial work with respect to which such individual is determined to no longer be suffering from a disabling physical or mental impairment, or (II) the third month following the earliest month in which such individual engages or is determined able to engage in substantial gainful activity, but in no event earlier than the first month occurring after the 36 months following such period of trial work in which he engages or is determined able to engage in substantial gainful activity),

or (if later) the earlier of—

(ii) the first month during no part of which he is a full-time elementary or secondary school student, or

(iii) the month in which he attains the age of 19,

but only if he was not under a disability (as so defined) in such earlier month; or

(H) if the benefits under this subsection are based on the wages and self-employment income of a stepparent who is subsequently divorced from such child's natural parent, the month after the month in which such divorce becomes final.

Entitlement of any child to benefits under this subsection on the basis of the wages and self-employment income of an individual entitled to disability insurance benefits shall also end with the month before the first month for which such individual is not entitled to such benefits unless such individual is, for such later month, entitled to old-age insurance benefits or unless he dies in such month. No payment under this paragraph may be made to a child who would not meet the definition of disability in section 423(d) of this title except for paragraph (1)(B) thereof for any month in which he engages in substantial gainful activity.

* * * * *

2. 42 U.S.C. 416 provides, in pertinent part:

Additional definitions

For the purposes of this subchapter—

* * * * *

(e) Child

The term "child" means (1) the child or legally adopted child of an individual, (2) a stepchild who has been such stepchild for not less than one year immediately

preceding the day on which application for child's insurance benefits is filed or (if the insured individual is deceased) not less than nine months immediately preceding the day on which such individual died, and (3) a person who is the grandchild or stepgrandchild of an individual or his spouse, but only if (A) there was no natural or adoptive parent (other than such a parent who was under a disability, as defined in section 423(d) of this title) of such person living at the time (i) such individual became entitled to old-age insurance benefits or disability insurance benefits or died, or (ii) if such individual had a period of disability which continued until such individual became entitled to old-age insurance benefits or disability insurance benefits, or died, at the time such period of disability began, or (B) such person was legally adopted after the death of such individual by such individual's surviving spouse in an adoption that was decreed by a court of competent jurisdiction within the United States and such person's natural or adopting parent or stepparent was not living in such individual's household and making regular contributions toward such person's support at the time such individual died. For purposes of clause (1), a person shall be deemed, as of the date of death of an individual, to be the legally adopted child of such individual if such person was either living with or receiving at least one-half of his support from such individual at the time of such individual's death and was legally adopted by such individual's surviving spouse after such individual's death but only if (A) proceedings for the adoption of the child had been instituted by such individual before his death, or (B) such child was adopted by such individual's surviving spouse before the end of two years after (i) the day on which such individual died or (ii) August 28, 1958. For pur-

poses of clause (2), a person who is not the stepchild of an individual shall be deemed the stepchild of such individual if such individual was not the mother or adopting mother or the father or adopting father of such person and such individual and the mother or adopting mother, or the father or adopting father, as the case may be, of such person went through a marriage ceremony resulting in a purported marriage between them which, but for a legal impediment described in the last sentence of subsection (h)(1)(B) of this section, would have been a valid marriage. For purposes of clause (2), a child shall be deemed to have been the stepchild of an individual for a period of one year throughout the month in which occurs the expiration of such one year. For purposes of clause (3), a person shall be deemed to have no natural or adoptive parent living (other than a parent who was under a disability) throughout the most recent month in which a natural or adoptive parent (not under a disability) dies.

* * * * *

(h) Determination of family status

(1)(A)(i) An applicant is the wife, husband, widow, or widower of a fully or currently insured individual for purposes of this subchapter if the courts of the State in which such insured individual is domiciled at the time such applicant files an application, or, if such insured individual is dead, the courts of the State in which he was domiciled at the time of death, or, if such insured individual is or was not so domiciled in any State, the courts of the District of Columbia, would find that such applicant and such insured individual were validly mar-

ried at the time such applicant files such application or, if such insured individual is dead, at the time he died.

(ii) If such courts would not find that such applicant and such insured individual were validly married at such time, such applicant shall, nevertheless be deemed to be the wife, husband, widow, or widower, as the case may be, of such insured individual if such applicant would, under the laws applied by such courts in determining the devolution of intestate personal property, have the same status with respect to the taking of such property as a wife, husband, widow, or widower of such insured individual.

(B)(i) In any case where under subparagraph (A) an applicant is not (and is not deemed to be) the wife, widow, husband, or widower of a fully or currently insured individual, or where under subsection (b), (c), (d), (f), or (g) of this section such applicant is not the wife, divorced wife, widow, surviving divorced wife, husband, divorced husband, widower, or surviving divorced husband of such individual, but it is established to the satisfaction of the Commissioner of Social Security that such applicant in good faith went through a marriage ceremony with such individual resulting in a purported marriage between them which, but for a legal impediment not known to the applicant at the time of such ceremony, would have been a valid marriage, then, for purposes of subparagraph (A) and subsections (b), (c), (d), (f), and (g) of this section, such purported marriage shall be deemed to be a valid marriage. Notwithstanding the preceding sentence, in the case of any person who would be deemed under the preceding sentence a wife, widow, husband, or widower of the insured individual, such marriage shall not be deemed to be a valid marriage unless

the applicant and the insured individual were living in the same household at the time of the death of the insured individual or (if the insured individual is living) at the time the applicant files the application. A marriage that is deemed to be a valid marriage by reason of the preceding sentence shall continue to be deemed a valid marriage if the insured individual and the person entitled to benefits as the wife or husband of the insured individual are no longer living in the same household at the time of the death of such insured individual.

(ii) The provisions of clause (i) shall not apply if the Commissioner of Social Security determines, on the basis of information brought to the Commissioner's attention, that such applicant entered into such purported marriage with such insured individual with knowledge that it would not be a valid marriage.

(iii) The entitlement to a monthly benefit under subsection (b) or (c) of section 402 of this title, based on the wages and self-employment income of such insured individual, of a person who would not be deemed to be a wife or husband of such insured individual but for this subparagraph, shall end with the month before the month in which such person enters into a marriage, valid without regard to this subparagraph, with a person other than such insured individual.

(iv) For purposes of this subparagraph, a legal impediment to the validity of a purported marriage includes only an impediment (I) resulting from the lack of dissolution of a previous marriage or otherwise arising out of such previous marriage or its dissolution, or (II) resulting from a defect in the procedure followed in connection with such purported marriage.

(2)(A) In determining whether an applicant is the child or parent of a fully or currently insured individual for purposes of this subchapter, the Commissioner of Social Security shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which such insured individual is domiciled at the time such applicant files application, or, if such insured individual is dead, by the courts of the State in which he was domiciled at the time of his death, or, if such insured individual is or was not so domiciled in any State, by the courts of the District of Columbia. Applicants who according to such law would have the same status relative to taking intestate personal property as a child or parent shall be deemed such.

(B) If an applicant is a son or daughter of a fully or currently insured individual but is not (and is not deemed to be) the child of such insured individual under subparagraph (A), such applicant shall nevertheless be deemed to be the child of such insured individual if such insured individual and the mother or father, as the case may be, of such applicant went through a marriage ceremony resulting in a purported marriage between them which, but for a legal impediment described in the last sentence of paragraph (1)(B), would have been a valid marriage.

(3) An applicant who is the son or daughter of a fully or currently insured individual, but who is not (and is not deemed to be) the child of such insured individual under paragraph (2) of this subsection, shall nevertheless be deemed to be the child of such insured individual if:

(A) in the case of an insured individual entitled to old-age insurance benefits (who was not, in the month preceding such entitlement, entitled to disability insurance benefits)—

(i) such insured individual—

(I) has acknowledged in writing that the applicant is his or her son or daughter,

(II) has been decreed by a court to be the mother or father of the applicant, or

(III) has been ordered by a court to contribute to the support of the applicant because the applicant is his or her son or daughter,

and such acknowledgment, court decree, or court order was made not less than one year before such insured individual became entitled to old-age insurance benefits or attained retirement age (as defined in subsection (l) of this section), whichever is earlier; or

(ii) such insured individual is shown by evidence satisfactory to the Commissioner of Social Security to be the mother or father of the applicant and was living with or contributing to the support of the applicant at the time such applicant's application for benefits was filed;

(B) in the case of an insured individual entitled to disability insurance benefits, or who was entitled to such benefits in the month preceding the first month for which he or she was entitled to old-age insurance benefits—

(i) such insured individual—

(I) has acknowledged in writing that the applicant is his or her son or daughter,

(II) has been decreed by a court to be the mother or father of the applicant, or

(III) has been ordered by a court to contribute to the support of the applicant because the applicant is his or her son or daughter,

and such acknowledgment, court decree, or court order was made before such insured individual's most recent period of disability began; or

(ii) such insured individual is shown by evidence satisfactory to the Commissioner of Social Security to be the mother or father of the applicant and was living with or contributing to the support of that applicant at the time such applicant's application for benefits was filed;

(C) in the case of a deceased individual—

(i) such insured individual—

(I) had acknowledged in writing that the applicant is his or her son or daughter,

(II) had been decreed by a court to be the mother or father of the applicant, or

(III) had been ordered by a court to contribute to the support of the applicant because the applicant was his or her son or daughter,

and such acknowledgment, court decree, or court order was made before the death of such insured individual, or

(ii) such insured individual is shown by evidence satisfactory to the Commissioner of Social Security to have been the mother or father of the applicant, and such insured individual was living with or contributing to the support of the applicant at the time such insured individual died.

For purposes of subparagraphs (A)(i) and (B)(i), an acknowledgment, court decree, or court order shall be deemed to have occurred on the first day of the month in which it actually occurred.

* * * * *

3. 20 C.F.R. 404.354 provides:

Your relationship to the insured.

You may be related to the insured person in one of several ways and be entitled to benefits as his or her child, i.e., as a natural child, legally adopted child, stepchild, grandchild, stepgrandchild, or equitably adopted child. For details on how we determine your relationship to the insured person, see §§ 404.355 through 404.359.

4. 20 C.F.R. 404.355 provides:

Who is the insured's natural child?

(a) *Eligibility as a natural child.* You may be eligible for benefits as the insured's natural child if any of the following conditions is met:

(1) You could inherit the insured's personal property as his or her natural child under State inheritance laws, as described in paragraph (b) of this section.

(2) You are the insured's natural child and the insured and your mother or father went through a ceremony which would have resulted in a valid marriage between them except for a "legal impediment" as described in § 404.346(a).

(3) You are the insured's natural child and your mother or father has not married the insured, but the insured has either acknowledged in writing that you are his or her child, been decreed by a court to be your father or mother, or been ordered by a court to contribute to your support because you are his or her child. If the insured is deceased, the acknowledgment, court decree, or court order must have been made or issued before his or her death. To determine whether the conditions of entitlement are met throughout the first month as stated in § 404.352(a), the written acknowledgment, court decree, or court order will be considered to have occurred on the first day of the month in which it actually occurred.

(4) Your mother or father has not married the insured but you have evidence other than the evidence described in paragraph (a)(3) of this section to show that the insured is your natural father or mother. Addition-

ally, you must have evidence to show that the insured was either living with you or contributing to your support at the time you applied for benefits. If the insured is not alive at the time of your application, you must have evidence to show that the insured was either living with you or contributing to your support when he or she died. See § 404.366 for an explanation of the terms "living with" and "contributions for support."

(b) *Use of State Laws*—(1) *General.* To decide whether you have inheritance rights as the natural child of the insured, we use the law on inheritance rights that the State courts would use to decide whether you could inherit a child's share of the insured's personal property if the insured were to die without leaving a will. If the insured is living, we look to the laws of the State where the insured has his or her permanent home when you apply for benefits. If the insured is deceased, we look to the laws of the State where the insured had his or her permanent home when he or she died. If the insured's permanent home is not or was not in one of the 50 States, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, or the Northern Mariana Islands, we will look to the laws of the District of Columbia. For a definition of permanent home, see § 404.303. For a further discussion of the State laws we use to determine whether you qualify as the insured's natural child, see paragraphs (b)(3) and (b)(4) of this section. If these laws would permit you to inherit the insured's personal property as his or her child, we will consider you the child of the insured.

(2) *Standards.* We will not apply any State inheritance law requirement that an action to establish paternity must be taken within a specified period of time mea-

sured from the worker's death or the child's birth, or that an action to establish paternity must have been started or completed before the worker's death. If applicable State inheritance law requires a court determination of paternity, we will not require that you obtain such a determination but will decide your paternity by using the standard of proof that the State court would use as the basis for a determination of paternity.

(3) *Insured is living.* If the insured is living, we apply the law of the State where the insured has his or her permanent home when you file your application for benefits. We apply the version of State law in effect when we make our final decision on your application for benefits. If you do not qualify as a child of the insured under that version of State law, we look at all versions of State law that were in effect from the first month for which you could be entitled to benefits up until the time of our final decision and apply the version of State law that is most beneficial to you.

(4) *Insured is deceased.* If the insured is deceased, we apply the law of the State where the insured had his or her permanent home when he or she died. We apply the version of State law in effect when we make our final decision on your application for benefits. If you do not qualify as a child of the insured under that version of State law, we will apply the version of State law that was in effect at the time the insured died, or any version of State law in effect from the first month for which you could be entitled to benefits up until our final decision on your application. We will apply whichever version is most beneficial to you. We use the following rules to determine the law in effect as of the date of death:

(i) If a State inheritance law enacted after the insured's death indicates that the law would be retroactive to the time of death, we will apply that law; or

(ii) If the inheritance law in effect at the time of the insured's death was later declared unconstitutional, we will apply the State law which superseded the unconstitutional law.

RESPONDENT'S BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED

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In the Supreme Court of the United States

MICHAEL J. ASTRUE,
COMMISSIONER OF SOCIAL SECURITY,
Petitioner,

v.

KAREN K. CAPATO, ON BEHALF OF B.N.C., ET AL.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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QUESTION PRESENTED

Whether the posthumously conceived biological child of married parents is a "child" of those parents for the purpose of receiving survivor benefits under Title II of the Social Security Act, 42 U.S.C. § 401 *et seq.*

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BRIEF FOR THE RESPONDENT

STATEMENT

To put it plainly, the government's reading of the Social Security Act ("the Act") makes no sense at all. The government posits that Congress entitled adopted children, stepchildren, grandchildren, and even stepgrandchildren to qualify for child survivor benefits without regard to their rights under state intestacy law. Yet it insists that the entitlement to benefits of the biological children of married parents is settled, not by reference to the straightforward definition of "child" in 42 U.S.C. § 416(e), but by reference to state intestacy rules pursuant to 42 U.S.C. § 416(h)(2)(A). This reading is perverse. There can be no doubt that Congress would have regarded the biological children of married parents as lying at the core of any definition of "child." The government does not even attempt to explain why Congress would have erected a statutory structure that turns this understanding on its head.

And in fact, it did not. The plain and utterly unambiguous language of the Act establishes that the biological children of a married couple are eligible for Social Security benefits as the survivors of their deceased parents. It is only children whose parents were not married, and whose parentage or parental relationships the 1939 Congress that enacted the governing provisions would have regarded as uncertain, who need have recourse to the intestacy mechanism of Section 416(h)(2)(A). The Third Circuit faithfully applied the Act in accord with its text and purpose. The decision below should be affirmed.

A. Statutory Provisions

1. Congress enacted the Social Security Act in 1935 to preserve "the security of the men, women, and children of the Nation" and to provide "a safeguard against misfortunes which cannot be wholly eliminated in this man-made world of ours." Review of Legislative Accomplishments of the Administration and Congress, H.R. Doc. No. 73-397, at 2 (1934). Members of Congress lauded the Act as "the broadest program for social security ever launched at one time by any government." H.R. Rep. No. 76-728, at 3 (1939). The Act's many important provisions include Title II, which offered disability and retirement benefits to insured workers. 42 U.S.C. § 401 *et seq.*

In 1939, Congress expanded the Act to include benefits for the families—including children—of deceased wage earners. Social Security Act Amendments of 1939, Pub. L. No. 76-379, tit. II, § 402, 53 Stat. 1363-1366. Congress intended "to strengthen and extend the principles and objectives" of the Act, with the goal of providing survivor benefits that would offer "more adequate protection to the family as a unit." H.R. Rep. No. 76-728, at 5, 7. And in 1965, Congress amended the Act's child survivorship benefits, expanding coverage to children born out of wedlock who it believed were the subject of unfair treatment under state intestacy laws. Old-Age, Survivors, and Disability Insurance Amendments of 1965, Pub. L. No. 89-97, tit. III, § 339, 79 Stat. 409; see also S. Rep. No. 89-404, at 109-110 (1965).

2. In keeping with this purpose, the Act today grants survivor benefits to "[e]very child (as defined in section 416(e) of this title) * * * of an individual who dies a fully or currently insured individual * * *." 42 U.S.C. § 402(d)(1). Section 416(e), in turn,

provides that "[t]he term 'child' means * * * the child or legally adopted child of an [insured] individual" (Section 416(e)(1)) or, in defined circumstances, the "stepchild" (Section 416(e)(2)) or "grandchild" (Section 416(e)(3)) of an insured individual.[1]

This case concerns the relationship between Section 416(e) and another provision of the Act, 42 U.S.C. § 416(h), which is titled "Determination of family status." Section 416(h) provides additional guidance on how to determine the existence of certain family relationships in specified circumstances. In particular, Section 416(h)(2)(A) states that, "[i]n determining whether an applicant is the child * * * of a fully or currently insured individual for purposes of this subchapter, the Commissioner of Social Security shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State" in which the wage earner was "domiciled at the time of his death * * *." Any applicant for benefits "who according to such law would have the same status relative to taking intestate personal property as a child * * * shall be deemed such." *Ibid.*

Sections 416(h)(2)(B) and 416(h)(3)(C) provide two additional grounds for coverage of a "son or daughter" who "is not (and is not deemed to be) the child of such insured individual" under Sections

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[1] To receive benefits, a "child" must satisfy certain criteria: (1) he or she must file an application for benefits, (2) must be unmarried and under the age of eighteen, and (3) must have been dependent on the deceased wage earner "at the time of * * * [the wage earner's] death." 42 U.S.C. § 402(d)(1)(A)-(C). Full-time students remain eligible until age nineteen, and the Act extends eligibility to children disabled before the age of twenty-two. See 42 U.S.C. § 402(d)(1)(B).

416(e) or 416(h)(2)(A). A "son or daughter" may be "deemed" the child of an insured parent if the child's parents "went through a marriage ceremony resulting in a purported marriage between them which, but for a legal impediment * * * would have been a valid marriage." 42 U.S.C. § 416(h)(2)(B). Or a "son or daughter" may be "deemed" a child of an insured individual if specified reliable indicia of parentage exist: written acknowledgement of parentage, a court decree establishing parentage, or other evidence of parentage satisfactory to the Commissioner of Social Security. See 42 U.S.C. § 416(h)(3)(C).

B. Factual Background

In 1999 Robert Nicholas ("Nick") Capato and respondent Karen Kuttner married in New Jersey. Only a few months later, Nick Capato was diagnosed with esophageal cancer. Pet. App. 16a, 18a. Recognizing that Nick Capato's chemotherapy treatment could leave him sterile, the Capatos attempted to guarantee that they could some day have a family together. Pet. App. 17a. In April 2000, Nick Capato began depositing sperm for the purpose of in vitro fertilization ("IVF") at a clinic in Florida. Pet. App. 18a.

Nick Capato's prognosis appeared to be improving, and in August 2001 Karen Capato gave birth to a naturally conceived son, Devon. Pet. App. 17a. Just a few months later, however, Nick Capato's condition began to deteriorate. Pet. App. 18a. Because the Capatos wanted siblings for Devon, they refocused their attention on IVF. Pet. App. 17a-18a. Aware that future children might be born after Nick Capato's death, they instructed their attorney to provide for unborn children in his will, so that "it would be understood that * * * they'd have the rights and be

supported in the same way that [Devon] was." Pet. App. 3a (citation omitted). The Capatos also swore before a notary that "[a]ny children born to us, who were conceived by use of our embryos shall in all respects and for all purposes including but not limited to, descent of property, [be] the children of our bodies." ALJ R. 47. Nick Capato's will, however, did not include this provision at the time of his death. Pet. App. 3a.

In March 2002, Nick Capato passed away at the age of forty-four. Pet. App. 2a. Karen Capato soon resumed the couple's attempt to have another child. Pet. App. 3a. Eighteen months later, after a successful round of IVF, she gave birth to twins. Pet. App. 3a. The government does not dispute that the twins are the biological children of Nick and Karen Capato.

C. Administrative and Court Proceedings

1. Immediately after the birth of her children, Karen Capato applied for Social Security survivor benefits on their behalf. Pet. App. 3a. The Social Security Administration denied her claim. Pet. App. 3a. Karen Capato then requested a hearing before an administrative law judge ("ALJ"). Pet. App. 3a.

In his opinion, the ALJ praised Karen Capato for her "highest intentions" and lack of an "ulterior motive" in applying for survivor benefits. Pet. App. 44a. The Capatos, he wrote, showed "courage in the face of tragic medical adversity and acted in a manner that we all can understand." Pet. App. 44a. For these reasons, the ALJ believed that "equity supports the claimant's applications" and that "allowing benefits to the children would appear to be consistent with the purposes of the Social Security Act." Pet. App. 45a. Nevertheless, the ALJ felt "constrained" to deny

eligibility for survivor benefits to the Capato twins. Pet. App. 45a. In the ALJ's view, posthumously conceived children must establish that they are eligible to inherit from their deceased parents under state intestacy law before they may qualify as "children" within the meaning of the Act. Pet. App. 39a. Finding that Nick Capato was domiciled in Florida, where posthumously conceived children may not inherit from parents who die intestate, the ALJ held that the Capato twins did not satisfy the intestacy requirements of Section 416(h)(2)(A) and therefore could not receive survivor benefits. Pet. App. 40a-41a, 46a-47a.

2. On appeal, the district court acknowledged that the Act defines "child" as "the child * * * of an individual" (Pet. App. 23(a)), but nevertheless affirmed the ALJ's decision. Pet. App. 15a. The court found controlling the terms of Section 416(h)(2)(A), which it determined was "Congress's instructions for the primary method" of identifying eligible children. Pet. App. 23a. Like the ALJ, the district court accordingly looked to Florida intestacy law and found that the Capato twins could not inherit from their father's estate. Pet. App. 24a. As a result, the court held that the twins had no basis for claiming survivor benefits. Pet. App. 24a.

3. The court of appeals reversed, rejecting the government's contention that state intestacy law and Section 416(h)(2)(A) govern the eligibility for survivor benefits of all posthumously conceived children. Pet. App. 1a-14a. The court found that the government's position ignored a "fundamental question": Why Section 416(h) should factor into a case concerning "the undisputed biological children of a deceased wage earner and his widow" when Section 416(e) "so

clear[ly]" resolved their status under the Act. Pet. App. 10a. The court explained that,

> [t]o accept the argument of the Commissioner [of Social Security], one would have to ignore the plain language of § 416(e) and find that the biological child of a married couple is not a "child" within the meaning of § 402(d) unless that child can inherit under the intestacy laws of the domicile of the decedent. There is no reason apparent to us why that should be so * * *.

Pet. App. 7a-8a.

Instead, the court of appeals held that the Capato twins qualified as eligible children under the unambiguous text of Sections 402(d) and 416(e) of the Act. Pet. App. 10a, 12a. The court found that the government had inverted the statute's analytical hierarchy: "The plain language of §§ 402(d) and 416(e) provides a threshold basis for defining benefit eligibility," while "[t]he provisions of § 416(h) then provide for '[d]etermination of family status'—subsection (h)'s heading—to determine eligibility where a claimant's status as the deceased wage earner's child is in doubt." Pet. App. 10a.

As the court noted, "a basic tenet of statutory construction is that, '[i]n the absence of an indication to the contrary, words in a statute are assumed to bear their ordinary, contemporary, common meaning.'" Pet. App. 10a (citation and internal quotation marks omitted). Here, because "all parties agree" that the Capato twins are the "biological offspring" of Nick Capato, the court found that "[t]he term 'child' in § 416(e) requires no further definition." Pet. App. 10a-11a.

Thus, in response to the "narrow question" whether a deceased wage earner's biological children qualify as "children" within the meaning of the Act, the court answered with "a resounding 'Yes.'" Pet. App. 12a. It added that, "[b]ecause we can resolve this issue based on our analysis of Congress' 'unambiguously expressed intent' in the statutory language, we need not determine whether the Commissioner's interpretation is a permissible construction of the statute." Pet. App. 11a n.5 (citing *Chevron, U.S.A., Inc.*, v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984)). The court vacated the district court's order in part and remanded for a determination whether the Capato twins should be deemed "dependent" on Nick Capato as required to receive benefits under the Act. Pet. App. 12a.[2]

SUMMARY OF ARGUMENT

A. The question in this case is answered by the plain language of the Act. Insofar as relevant here, Section 402(d)(1) makes benefits available to "every child (as defined in section 416(e) of this title)." Section 416(e), in turn, defines a "child" to include "the child or legally adopted child" of an insured individ-

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[2] There are substantial reasons why, under the governing regulations, Nick Capato's children should be "conclusively deemed dependent on [him] under the Act." *Gillett-Netting* v. *Barnhart*, 371 F.3d 593, 599 (9th Cir. 2004). See *Mathews* v. *Lucas*, 427 U.S. 495, 498-499 (1976) ("a child who is legitimate * * * is considered to have been dependent at the time of the parent's death"). The court of appeals also left open whether Nick Capato was domiciled in Florida at the time of his death (Pet. App. 12a n.6), an issue that would have to be addressed on remand if the government prevails before this Court; for reasons explained in our brief in opposition to the petition for certiorari (at 9-12), there are substantial arguments that he was not.

ual (in clause (1)); "a stepchild" who satisfies certain requirements (in clause (2)); and a "grandchild or stepgrandchild" who satisfies specified requirements (in clause (3)). There is no doubt that the word "child" reaches (and in 1939 was understood to reach) the biological child of married parents—and therefore that Section 416(e)(1) applies to the Capato twins. This reading is confirmed by the statutory context and structure: It is plain that Congress used the word "child" in clause (1) to mean the biological child of married parents, as distinct from the adopted, step-, and grandchildren addressed in the remainder of Section 416(e). A plain application of Section 416(e)(1) therefore resolves this case.

B. The government cannot overcome the clear statutory text by arguing that the intestacy rule of Section 416(h)(2)(A) applies in all cases, including that of children defined by Section 416(e). In fact, the government concedes that Section 416(h)(2)(A)'s intestacy test does *not* apply to adopted children, stepchildren, grandchildren, or stepgrandchildren—that is, *all* of the children addressed by Section 416(e) *except* the biological children of married parents. The government's contention that some, but not all, applicants for benefits who are defined as a child by Section 416(e) must have their eligibility determined by reference to Section 416(h)(2)(A) finds no support in the statutory language; makes impermissible extra-textual distinctions between and even within clauses of Section 416(e); and renders the statute nonsensical, making benefits automatically available to adopted, step-, and grandchildren, but not to the biological children of married parents. It also leaves Section 416(h)(2)(A) itself unintelligible. That provision states that applicants who have the "same status" under state intestacy law "as a child" shall "be

deemed such." This language make sense only if Section 416(e)(1) provides an independent meaning to the word "child."

In fact, it is plain from the statutory language and context that Congress included Section 416(h)(2) in the Act to *expand* the statute's coverage beyond the biological children of married parents, reaching those whose parentage might be doubtful (in particular, children born out of wedlock). That is plain from the statutory context. In hinging qualification for benefits on state intestacy law, Congress would have been thinking *only* of the children of unmarried parents; in 1939, the biological children of married parents universally could take their parents' intestate personal property, while the intestacy rules for children born out of wedlock were much more restrictive. That Congress was thinking only of illegitimate children in Section 416(h)(2)(A) is supported by Section 416(h)(2)(A)'s companion provision, Section 416(h)(2)(B), which provides benefits to children whose parents went through a technically invalid marriage ceremony. And it is confirmed by Congress's repeated use of the word "deemed" in Section 416(h)(2), which shows that Congress meant that children who qualify for benefits under that provision are not, but should be treated as though they are, the biological children of married parents.

C. The government gets no support from the history and purpose of the Act. The history of the Act's 1965 amendment shows that Congress favored uniformity in the availability of benefits. The Act's broader purposes indicate that Congress regarded the statute as a remedial provision that would be interpreted generously; the government is wrong that survivor benefits are warranted only when the in-

sured's death was "unanticipated." Principles of federalism have no application to this case, which concerns entitlement to *federal* benefits. And agency deference cannot save the government's case: The statutory language is wholly unambiguous, and, in any event, the Social Security Administration's discriminatory reading of the Act draws arbitrary and irrational distinctions. If, as the government contends, new technologies lead to results that Congress did not anticipate, it is for Congress, and not an agency or the courts, to make any desirable changes in the statutory language.

ARGUMENT

The government's argument hinges on the proposition that Congress established, and limited, the Social Security survivorship rights of the biological children of married parents through circuitous indirection. But that improbable assertion is wrong. Congress regarded such children as the *principal* beneficiaries of the Social Security survivorship program; indeed, Congress saw that principle as so obvious that it did not require many words to establish. On this question, the text and structure of the Act is plain: Children like the Capato twins, conceived by parents in a marital relationship, qualify for Social Security child survivor benefits.

A. The Term "Child" As Used In Section 416(e)(1) Includes The Biological Children Of Married Parents Without Regard To When Or How The Child Is Born.

1. The Act sets out a threshold requirement for the award of survivor benefits: that the survivor be a "child." In particular, Section 402(d)(1) provides that,

upon the satisfaction of certain conditions not at issue here, "[e]very child (*as defined in section 416(e) of this title*) * * * of an individual who dies a fully or currently insured individual * * * shall be entitled to a child's insurance benefit." 42 U.S.C. § 402(d)(1) (emphasis added). The question before the Court is whether the Capato twins are "children" within the meaning of this provision.

The Third Circuit answered this question by applying basic principles of statutory interpretation. All agree that "[t]he task of resolving [a] dispute over the meaning of [a statute] begins * * * with the language of the statute itself." *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). The court below therefore looked at the definition of "child" provided by Section 416(e), as it was expressly directed to do by Section 402(d)(1). Section 416(e) provides: "The term 'child' means (1) the child or legally adopted child of an individual, (2) a stepchild [who satisfies specified requirements], and (3) a person who is the grandchild or stepgrandchild of an [insured] individual or his spouse [in specified circumstances where the applicant child's parents predeceased the grandparent or stepgrandparent]."

The Third Circuit found this definition of "child" in Section 416(e)(1) to be "unambiguous[]" and to cover the Capato twins. Pet. App. 11a n.5. As the court noted, because the twins are the "undisputed biological offspring of a deceased wage earner and his widow," "[t]he term 'child' [in the statute] requires no further definition." Pet. App. 10a-11a. That holding was correct: At the time of the enactment of Section 416(e), the principal definition of "child" for legal purposes was: "[i]n *Law*, legitimate offspring." *Webster's New International Dictionary* 465 (2d ed.

1934). And the ordinary, nonspecialized definition of child was, and remains, a "son or daughter," terms that in turn are understood to mean a male or female "descendant." *Merriam Webster's Collegiate Dictionary* 214, 317, 1189 (11th ed. 2003). See *Webster's New International Dictionary* 465 (2d ed. 1934) (definition includes "[a] son or a daughter; a male or female descendant in the first degree; the immediate progeny of human parents"). Or, as the Restatement (Third) of Property puts it, "[a]n individual is the child of his or her genetic parents." Restatement (Third) of Property (Wills & Donative Transfers) § 2.5(1) (1999); see also *Gillett-Netting* v. *Barnhart*, 371 F.3d 593, 596-597 (9th Cir. 2004); *Tsosie* v. *Califano*, 630 F.2d 1328, 1333 (9th Cir. 1980) ("Under § 416(e), the term 'child' includes a person's natural children and his legally adopted children."). Accordingly, while the status under the Act of children whose parents were *not* married might be debated (a question we address below), there is no doubt that the biological offspring of married parents fall squarely within even the narrowest understanding of the word "child" as used in Section 416(e)(1).

The Third Circuit thus did no more than apply common sense and the guidance of this Court: "In the absence of an indication to the contrary, words in a statute are assumed to bear their ordinary, contemporary, common meaning." *Walters* v. *Metro. Educ. Enters. Inc.*, 519 U.S. 202, 207 (1997) (citation omitted). And the government very notably does not deny that, under the ordinary meaning of the word as used in 1939 (and today), the Capato twins are the marital "children" of their biological father. The government's approach to the question here thus discounts the possibility that, in Sections 402(d)(1) and 416(e), Congress simply "sa[id] * * * what it mean[t]

and mean[t] * * * what it sa[id]." *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 254 (1992). And that makes mystifying the government's statement that the Third Circuit "made little effort to anchor [its] position to the text of the statute." Gov't Br. 9.[3]

2. In fact, the government's complaint is that the statutory language is *too* plain: It maintains that the definition "a 'child' is a child" is a "tautology" that cannot be given "full meaning * * * without help from neighboring provisions." Gov't Br. 11 (internal quotation marks and citations omitted). But that argument is wrong, for several reasons.

First, any doubt about the meaning of the definition of "child" *is* resolved by the neighboring language of Subsection 416(e). That provision defines "child" to mean "child or legally adopted child of an individual" in clause (1); "stepchild" (in specified circumstances) in clause (2); and "grandchild or stepgrandchild" (in specified circumstances) in clause (3). These clauses listed what would, in 1939, have

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[3] The kind of definition adopted in Section 416(e), which recognizes that the word "child" has a settled meaning in common usage, is typical of many statutes enacted around the same time as the Act. For example, in the National Service Life Insurance Act of 1940, Congress provided that "[t]he term 'child' includes an adopted child" (38 U.S.C. § 801(e) (1940)) but did not elaborate on what a child is. For other examples from around that time, see, for example, World War Adjusted Compensation Act, Pub. L. No. 57-120, 43 Stat. 130 (1924) (not defining "child," but providing that it "includes" certain categories of child, for purposes of benefits to veterans after World War I); Pub. L. No. 70-701, 45 Stat. 1254 (1929) (same, in context of children of dependents of Army, Navy, Marine Corps, and other government personnel); and Nationality Act of 1940, Pub. L. No. 76-863, 54 Stat. 1138 (same, for purposes of Nationality Act of 1940).

been the principal custodial, familial adult/child relationships. And in context, it is apparent that Congress used the unadorned word "child" in clause (1) to mean undisputed biological child of married parents, as distinct from an adopted, step-, or grandchild. The text might be more felicitous had Congress used a formulation other than "a child is a child" to capture this concept, but when read against the other categories of child listed elsewhere in clause (1) and in clauses (2) and (3) of Section 416(e), there can be no doubt what Congress meant by "child" in Section 416(e)(1). It is fundamental that "words of a statute must be read in their context and with a view to their place in the overall statutory scheme," *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quotation marks omitted), and when that is done the meaning of "child" as used in Section 416(e)(1) is not tautological at all.[4]

Second, as we explain in more detail below, the government recognizes that the entitlement to child survivor benefits of every sort of applicant *other* than

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[4] The government is of course correct in stating that the Act does not use the terms "undisputed biological child" or "biological child" (Gov't Br. 9), but the contrast and parallel treatment the Act draws between "child," "adopted child," and "stepchild" leaves little doubt that "child" as used in Section 416(e)(1) refers to the biological child of married parents. In the context of the time, those would have been the characteristics that Congress had in mind as the paradigm of a "child" in a family relationship; at the time of enactment of the Act, some 96 percent of children in the United States were born to married parents. Stephanie A. Ventura & Christine A. Bachrach, *Nonmarital Childbearing in the United States, 1940-99*, U.S. Dep't of Health & Human Servs. 17 (2000), *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr48/nvs48_16.pdf (showing that only 3.8% of children were born out of wedlock in 1940).

a "child" listed in Section 416(e)(1) (that is, every adopted child, stepchild, grandchild, and stepgrandchild) is determined *solely* by reference to the Section 416(e) definition. That being so, it would be most peculiar if Congress expected the definition of "child" in Section 416(e)(1), alone among these terms, to require supplementation from some other part of the Act. The ordinary rules of construction preclude such a reading. Cf. *Babbitt* v. *Sweet Home Chapter of Cmtys. for a Greater Or.*, 515 U.S. 687, 720-721 (1995) (Scalia, J., dissenting) (noting that similar items in a list should be interpreted alike); *Beecham* v. *United States*, 511 U.S. 368, 371 (1994); (same); *Massachusetts* v. *Morash*, 490 U.S. 107, 114-115 (1989) (same). And that is especially so because the words "stepchild" and "grandchild"—which the government concedes stand on their own—are no more "legal" or self-defining, and no less tautological in this context, than the word "child."[5]

Third, the Section 416(e)(1) definition of "child" is not tautological at all; it provides that the *legal* definition of "child" for purposes of the Act is the common usage of the term. As Judge Davis observed in his dissent from the Fourth Circuit's decision in *Schafer* v. *Astrue*, 641 F.3d 49, 65 (4th Cir. 2011), *cert. pending*, No. 11-824, Congress's definition of the term "child" in Section 416(e) to include "a child" *and*

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[5] The government also asserts that "'child' is a term of art under the Act that describes the *legal* relationship the applicant must have to the insured in order to be eligible for benefits." Gov't Br. 10-11. But that surely is not true so far as Section 416(e) is concerned—except for its specification of a "legally adopted" child. The relationship of a "grandchild" to his or her grandparent, for example, is no more (or less) a legal one than that of a "child" to his or her parent.

a range of other individuals was "a kind of legislative shorthand" that "substitute[s] a single word or phrase as an abbreviation" for a complicated and "cumbersome list[]." Recognizing that usage does not render use of the word "child" in Section 416(e)(1) in any way "unclear," but instead simply requires a court to undertake the familiar interpretive task of determining whether a word as used by Congress applies in particular circumstances. That is just what the Third Circuit did.

B. The Government's Contrary Reading Is Inconsistent With The Plain Language And Structure Of The Act.

In arguing to the contrary, the government does not, and could not, deny that each of the Capato twins is a "child" of Nick Capato within the ordinary meaning of that word. Instead, it contends that Section 416(h) must be used to supply "further definition" to the meaning of "child" as the word is defined in Section 416(e) (Gov't Br. 8), and that "Section 416(h) provides a clear indication" that the word "child" as used in Section 416(e) should *not* bear its "ordinary, contemporary, common meaning." Gov't Br. 10 (citation and internal quotation marks omitted); see Gov't Br. 9-14. The government places principal reliance for this contention on Section 416(h)(2)(A). The first sentence of that provision states that the Commissioner, "[i]n determining whether an applicant is the child or parent of a fully or currently insured individual for purposes of this subchapter, * * * shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which such insured individual * * * was domiciled at the time of his death." The second sentence of Section

416(h)(2)(A), which the government omits from its quotation of the provision in the text of its brief (Gov't Br. 8), then provides: "Applicants who according to such law *would have the same status* relative to taking intestate personal property *as a child* or parent *shall be deemed such*." (Emphasis added).

Although Sections 402(d)(1) and 416(e) make no reference to Section 416(h), the government insists that Section 416(h)(2)(A)'s statement that the Commissioner "shall apply" state intestacy law "demonstrates that the test set out in that provision is exclusive where, as here, the alternative tests in Section 416(h)(2)(B) and (3)(C) are not satisfied." Gov't Br. 10. See *id.* at 15 ("[T]he tests in Section 416(h)(1), (2), and (3) are intended to be used in *all* cases to determine whether the requisite family status is established as a legal matter."). But here, too, the government is wrong. In fact, it is plain from the statutory language and context that Congress included Section 416(h)(2) in the Act to *expand* the statute's coverage beyond the biological children of married parents, reaching those (like children born out of wedlock) whose parentage might be doubtful. For several reasons, that provision has no bearing in this case.

1. Most obviously, the government's central contention—that Section 416(h)(2)(A)'s intestacy test is the "exclusive" qualification for benefits and applies in "*all* cases" (except those where Sections 416(h)(2)(B) and (h)(3)(C) apply)—is self-evidently incorrect, as the government itself impliedly recognizes. The government expressly acknowledges that the eligibility for benefits of legally adopted children, stepchildren, grandchildren, and stepgrandchildren is determined *exclusively* by reference to the definitions

stated in Sections 416(e)(1), (2), and (3), and that these very significant categories of children need *not* satisfy the Section 416(h)(2)(A) intestacy test. Gov't Br. 12 n.2. This means that, despite what it says so forcefully in its brief, the government realizes that the use of "shall" in Section 416(h)(2)(A) does *not* require application of an intestacy screen in all cases concerning dependency benefits; indeed, it means that the government *agrees with our reading of the statute* as it applies to *all* the categories of children listed in Section 416(e) *except* the biological children of married parents addressed in Section 416(e)(1).[6]

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[6] Although the government does not explain why it takes the position that Section 416(h)(2)(A) applies to only one of the categories of "child" identified in Section 416(e), it presumably recognizes that a contrary view would read some of Section 416(e) out of the Act altogether. Thus, Section 416(e)(2) provides that a stepchild who had been a stepchild for "less than nine months immediately preceding the day on which [the insured] individual died" should not have a right to receive survivor benefits under Section 402(d)(1). But in some states, such as California, stepchildren may inherit from their stepparents regardless of the length of time that the stepchild-stepparent relationship has lasted. See Cal. Prob. Code § 6454 (West 2011). Applying Section 416(h)(2)(A) to such stepchildren would do violence to Section 416(e)(2). Similarly, Section 416(e)(3) provides that grandchildren and stepgrandchildren qualify for survivor benefits only in specified circumstances. Under the intestacy laws of many states, however, grandchildren and stepgrandchildren whose parents predecease them inherit automatically from their grandparents or stepgrandparents. See, *e.g.*, Va. Code Ann. § 64.1-3 (West 2011). Application of Section 416(h)(2)(A) to these children would displace the carefully defined limits drawn by Section 416(e)(3). The lesson of these provisions, of course, is that Congress intended Sections 416(e) and (h)(2)(A) to operate independently.

The government's actual contention—that some, but not all, applicants for benefits who are defined as a "child" by Section 416(e) must have their eligibility determined by reference to Section 416(h)(2)(A)—finds *absolutely* no "anchor" in the "text of the statute." Gov't Br. 9. That reading also renders the statute nonsensical: It means that Congress intended to make benefits automatically available to all legally adopted children and (in specified circumstances) stepchildren, grandchildren, and stepgrandchildren, but *not* to the biological children of married parents, who must make a separate showing under a different provision of the Act. The government offers no explanation why Congress would have accorded different and less favorable treatment to the biological children of a married couple than to that couple's adopted or stepchildren, or to their grandchildren. It is very difficult to imagine what that explanation could be.

For several reasons, the government's concession that the Section 416(e) definitions are controlling for most categories of children is fatal to its case here. It belies the government's plain language reliance on the use of "shall" in Section 416(h)(2)(A) as making that provision's test determinative in all cases. As we have shown, it makes impermissible extra-textual distinctions in the application of Section 416(e) between and even within the clauses of that provision, making satisfaction of Section 416(e)'s definitions dispositive for some but not for other applicants. It renders the word "child" in Section 416(e)(1) a "nullity." *Schafer*, 641 F.3d at 64 (Davis, J., dissenting).[7]

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[7] The government denies that is so, maintaining that "Section 416(e)(1) clarifies that both natural children and legally adopted children are eligible for benefits." Gov't Br. 12. But that

And, not least, it attributes to Congress an intention that is perverse: "If § 416(e) overrides * * * § 416-(h)(2)(A) in the exotic case of stepgrandchildren—that is, if one accepts the Commissioner's position * * * and acknowledges that a stepgrandchild is entitled to benefits regardless of his or her ability to take under a particular state's intestacy law—it is not apparent why the same would not be true in the case of a biological child." *Id.* at 66.

2. That is enough to require rejection of the government's argument. But there is more: The government's reading renders Section 416(h)(2)(A) *itself* unintelligible. After instructing the Commissioner to apply state intestacy law "[i]n determining whether an applicant is [a] child," the second sentence of Section 416(h)(2)(A) provides that "[a]pplicants who according to [state intestacy] law would have the *same status* relative to taking intestate personal property *as a child* or parent shall be *deemed such*." 42 U.S.C. 416(h)(2)(A) (emphasis added). This second sentence is nonsensical unless the word "child" has independent force and is given the meaning we describe above:

> That is, §416(h)(2)(A) requires *precisely the same interpretation of "child"* that the [government] fled from in § 416(e)(1). One cannot reasonably compare a claimant's status under intestacy to the status of "a child" until one settles on the definition of "child." Thus

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hardly answers the superfluity point. If, as the government argues, all children who would inherit under state intestacy law were eligible for benefits, and *only* children who would inherit under state intestacy law were eligible for benefits, Section 416(e)(1) would not add clarification to the Act; indeed, it would add nothing at all.

> it makes little sense to abandon § 416(e)(1) on the ground that the word "child" is vague in favor of § 416(h)(2)(A), which *also* requires an extraneous definition of "child."

Schafer, 641 F.3d at 66 (Davis, J., dissenting). Such a circular reading of the Act cannot be correct. See *W. Va. Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83, 101 (1991) (goal when courts interpret statutes is to "make sense rather than nonsense out of the *corpus juris*").

3. Moreover, although professing to heed the statute's plain language, the government argues that, in providing for the payment of benefits to every child "as defined in section 416*(e)*," Congress actually meant to say "as defined in section 416*(h)*," a different statutory provision that uses an altogether different formulation. Yet the structure of the Act demonstrates that Congress intended Section 416(e) to stand alone without implicitly incorporating Section 416(h).

Thus, Section 402(d)(1) provides that "[e]very child *(as defined in section 416 (e) of this title)* * * * shall be entitled to a child's insurance benefit * * * ." 42 U.S.C. § 402(d)(1) (emphasis added). Neither it nor Section 416(e) makes reference to Section 416(h)(2). But a different, and analytically distinct, provision in Section 402(d) *does* refer to the determination of "child" status described in Section 416(h)(2). In section 402(d)(3), the Act provides that, "[f]or purposes of this paragraph, a child deemed to be a child of a fully or currently insured individual pursuant to *section 416 (h)(2)(B) or section 416 (h)(3)* of this title shall be deemed to be the legitimate child of such individual." 42 U.S.C. § 402(d)(3) (emphasis added).

In this setting, as Judge Davis noted, "Congress *specifically* invoked § 416(e)" in Section 402(d)(1) "and went on to *specifically* invoke § 416(h) in a neighboring provision," Section 402(d)(3), for a different purpose. *Schafer*, 641 F.3d at 64 (Davis, J., dissenting). This accordingly "is not a case in which we must choose between two competing statutory definitions, for here *Congress has chosen for us.*" *Ibid.* Indeed, "it is difficult to imagine how Congress could have more clearly indicated that it understood the difference between the two definitions and was deliberately choosing to apply § 416(e)[]," and *not* Section 416(h), in setting the eligibility for benefits of children whose familial relationship with the wage earner is undisputed. *Ibid.*

4. An examination of the statutory context and background makes clear what Congress actually *did* intend in Section 416(h)(2)(A): Not a general screen governing all child applicants for survivor benefits that trumps Section 416(e)(1), but a method for children to qualify for benefits when their relationship to the wage earner might be unclear—in particular, for children whose parents were not married. Several compelling considerations support this conclusion.

a. The context in which Congress enacted Section 416(h)(2)(A) strongly suggests that, in hinging qualification for benefits on state intestacy law, Congress would have been thinking *only* of the children of unmarried parents. Although the biological children of married parents universally could take their parents'

intestate personal property in 1939[8]—and applying Section 416(h)(2)(A)'s intestacy test to such children accordingly would have been a most peculiar and indirect way of establishing their entitlement to survivor benefits—the rules for children born out of wedlock were very different: Some states permitted inheritance only if the father married the mother, others allowed the child to inherit from the father if the father acknowledged the child, and at least one state apparently had no provision permitting the child to inherit from the father at all.[9] A rule premised on

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[8] "As the Commissioner has [elsewhere] conceded, Congress believed that 'all state laws ... provided for inheritance of marital children.'" *Schafer*, 641 F.3d at 67-68 (Davis, J., dissenting) (citation omitted; ellipses added by the court). See also 43 Fed. Reg. 57590, 57591 (1998) ("A child of a valid marriage has inheritance rights under the laws of all states.").

[9] See, *e.g.*, Colo. Stat. Ann. ch. 176, § 8 (Bradford-Robinson 1935) (an illegitimate child may inherit from the father only if the father marries the mother and acknowledges the child); Fla. Comp. Gen. Laws tit. 1, § 5480(7) (Harrison 1936) (an illegitimate child may inherit directly from his father if his father acknowledges him in writing, but may not inherit from his father's kindred); Md. Code Ann. art. 46, § 6 (Lord Baltimore 1924) (an illegitimate child may inherit from the father if the father marries the mother and acknowledges him); Mich. Comp. Laws tit. 26, § 13443 (Franklin DeKleine 1929) (an illegitimate child may inherit from his father if he marries the mother or if he acknowledges the child in a manner authorized by law); Minn. Gen. Stat. ch. 74, § 8723 (Review 1923) (an illegitimate child may inherit from his father if the father acknowledges him in writing and before a witness, or if the parents intermarry); Miss. Code Ann. tit. 5, § 474 (Harrison 1942) (an illegitimate child may inherit from his father if the father and mother intermarry); Mo. Rev. Stat. ch. 1, § 315 (Midland 1939) (an illegitimate child may inherit from his father if the parents intermarry and the father recognizes the child to be his); Mont. Rev. Code Ann. § 7074 (Tribune 1935) (an illegitimate child is the

status under intestacy law plainly seems directed at such children.

And that understanding of the congressional intent is confirmed by the companion provision enacted along with Section 416(h)(2)(A), Section 416(h)(2)(B), which provides that an applicant who is not a "child" of an insured individual (presumably under the Section 416(e) definition) and is not "deemed" to be a child (presumably under Section 416(h)(2)(A)) "shall nevertheless be deemed to be the child of such insured individual" if the insured individual and the child's other parent "went through a marriage ceremony resulting in a purported marriage between them which, but for a legal impediment * * * would have been a valid marriage." Inclusion of this provision along with Section 416(h)(2)(A) strongly suggests that Congress meant Section 416(h)(2) to provide a means to overcome uncertainty about parentage or the strength of the parental relationship. *Cf.*

heir of the person who acknowledges himself to be the child's father, but is not heir to the father's kin unless the parents intermarry); Neb. Comp. Stat. § 30-109 (1929) (an illegitimate child is the heir of the person who acknowledges himself to be the child's father, but is not heir to the father's kin unless the parents intermarry); N.H. Rev. Laws ch. 360, § 5 (1942) (an illegitimate child may inherit from his mother; no provision made for child to inherit from father); N.J. Rev. Stat. §§ 3:5-7, 3:5-8 (1937) (an illegitimate child may inherit from his mother, but not from his father, unless the parents intermarry and the child resides with them); N.M. Stat. Ann. § 31-118 (Bobbs-Merrill 1941) (an illegitimate child may inherit from father if father recognizes him in writing before multiple witnesses, or if such recognition be "general and notorious"); Or. Code Ann. § 10-201 (Bobbs-Merrill 1930) (an illegitimate child may inherit from father if his parents intermarry; no provision made for paternal inheritance without marriage); Utah Code Ann. § 101-4-10 (1933) (an illegitimate child may inherit from his father as a legitimate child if his father acknowledges him).

McMillian v. *Heckler*, 759 F.2d 1147, 1150 (4th Cir. 1985) ("An illegitimate claimant may establish that he is a 'child' for eligibility purposes under [§ 416(h)].").[10]

That conclusion receives further support from Section 416(h)(3)(C), which Congress added to the Act in 1965. That provision makes benefits available to individuals where parentage has been established by a parent's written acknowledgement, a judicial decree, a court order of support, or other evidence sufficient to show the Commissioner that the insured was the parent and had been supporting the applicant. Tellingly, the Senate Report accompanying the 1965 amendment that enacted Section 416(h)(3) describes 416(h) as designed to determine the status only of "a child born out of wedlock." S. Rep. No. 89-404 (1965), reprinted in 1965 U.S.C.C.A.N. 1943, 2050. This suggests, as Judge Davis put it, that "§ 416(h) was meant to be *additive*—extending benefits to the children of unwed parents—rather than an attempt to supplant and, in places, narrow the scope of benefits promised by § 416(e)'s definition of 'child.'" *Schafer*, 641 F.3d at 67 (Davis, J., dissenting).

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[10] Section 416(h)(2)(B) also highlights another bizarre consequence of the government's construction. If the Capato twins "could show that there was some technical defect in the[ir parents'] marriage paperwork, then, even under the [government's] reading of the statute, [each of the twins] would qualify as a 'child' under § 416(h)(2)(B). *To deny [them] benefits because [their] parents' marriage was valid would be bizarre.* This provision again shows that Congress intended to include children of a valid marriage in its definition of 'child,' for what possible purpose would Congress have for covering children of a technically invalid marriage but not those of legally valid ones?" *Schafer*, 641 F.3d at 69 (Davis, J., dissenting).

b. The conclusion that Congress intended Section 416(h)(2) to provide applicants who are not the biological children of married parents an alternative mechanism with which to qualify for benefits also is suggested by the Act's otherwise curious use of the word "deemed." As we have noted, Section 416(h)(2)(A) provides that applicants who "would have the same status relative to taking intestate personal property as a child"—by which, as we also have explained, Congress meant the same as a biological child of married parents—"shall be deemed" to be a child. "Deemed" is a word generally used to require that something be treated for legal purposes "as if (1) it were really something else or (2) it has qualities that it does not have." *Black's Law Dictionary* 477 (9th ed. 2009). See also *Shi Liang Lin* v. *U.S. Dep't of Justice*, 494 F.3d 296, 307 & n.9 (2d Cir. 2007) (en banc). Congress surely meant by this formulation that children who qualify for benefits under the intestacy route are not, but should be treated as though they are, the biological children of married parents. "[T]his second sentence makes it pellucidly clear that § 416(h)(2)(A) *supplements*, rather than *replaces* § 416(e)(1)" and its definition of a "child." *Schafer*, 641 F.3d at 66 (Davis, J., dissenting).

The point is confirmed by the repeated use of "deemed" in Sections 416(h)(2)(B) and (h)(3)(C), each of which refers to an applicant "who is not (*and* is not deemed to be)" a "child." 42 U.S.C. § 416(h)(2)(B), (h)(3)(C) (emphasis added). This usage must be understood to reflect Congress's understanding that Sections 416(e) and 416(h) provide *alternative* means of qualifying for benefits (an applicant either "*is* a child" or "*is deemed to be* a child"), and that an applicant who is "deemed" to be a child has different characteristics (*i.e.*, is not the biological offspring of

married parents) than an applicant who "is" a child (*i.e.*, is such an offspring). If that were not so—if, as the government contends, the substance of Section 416(h) "is already incorporated into Section 416(e)(1)'s definition of 'child'" (Gov't Br. 12)—the "deemed" language of Sections 416(h)(2) and 416(h)(3) would be superfluous (indeed, it would be meaningless); all that would matter is whether the applicant is, or is not, a "child." And "[i]t is * * * a cardinal principle of statutory construction that a statute ought * * * to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *Alaska Dep't of Envtl. Conservation* v. *EPA*, 540 U.S. 461, 489 n.13 (2004) (internal citations omitted).

Section 402(d)(3)—the only provision of the Act that expressly invokes Sections 416(h)(2) and 416(h)(3)—supports this understanding of Section 416(h). To be eligible for survivor benefits under Section 402(d)(1), a qualifying child must be "dependent upon" the insured decedent. 42 U.S.C. § 402(d)(1)(C). Section 402(d)(3) deems a "child" covered by Section 402(d)(1)(C) *per se* "dependent," except in limited circumstances, such as where a child did not live with the decedent parent *and* the child was born out of wedlock. Yet Section 402(d)(3) deems a child who is within the scope of Sections 416(h)(2)(B) and 416(h)(3) legitimate for purposes of this provision (even though, as a matter of fact, he or she may have been born outside of marriage). Thus, the children of unmarried parents who satisfy the terms of Sections 416(h)(2) and 416(h)(3) are entitled to the legal presumption of dependency, whereas that presumption is inapplicable to the children of unmarried parents who do not satisfy those terms. See *Gillett-Netting*, 371 F.3d at 598. It is in *that* context of unmarried

parents, and not in cases like this one, that Section 416(h) comes into play. See *id.* at 596-597.

c. The government also is wrong in equating the Act's treatment of husbands, wives, widows, and widowers under Section 416(h)(1)(A)(i) with its treatment of children in Section 416(h)(2)(A). Gov't Br. 13-14, 15. In fact, the language of the provisions is not parallel in their invocation of state intestacy law. Section 416(h)(1)(A) (emphasis added) says that "[a]n applicant *is* the wife, husband, widow, or widower" of an insured individual if the courts of the relevant state would find that they were validly married; the statute does *not* say that persons who satisfy this test are "deemed" to be a wife, husband, widow, or widower.

Section 416(h)(2)(A), in contrast, says that, "*[i]n determining whether an applicant is the child or parent*" of an insured individual, the Commissioner shall apply state intestacy law and "*[a]pplicants who according to such law would have the same status relative to taking intestate personal property as a child or parent shall be deemed such.*" 42 U.S.C. § 416(h)(2)(A) (emphasis added). None of the italicized language, referring to a determination by the Commissioner whether the applicant has the "same status" as a child or parent for the purpose of "deeming" them such, appears in the provision addressing wives, husbands, widows, and widowers. This difference in the language of adjacent provisions drafted at the same time must be regarded as intentional and given effect—and the only logical way to explain this difference in phrasing is that the definitional provisions relating to children have independent force, while those relating to husbands and wives do not. As we have explained, the Commissioner himself

has given (most of) Section 416(e) just that reading, and differentiated it from Section 416(h)(1)(A)(i), in just that way.[11]

C. The Act's History And Purpose Confirm That The Intestacy Test Of Section 416(h)(2)(A) Does Not Apply To The Biological Children Of Married Parents.

In challenging the decision below, the government also looks to the legislative history and purpose

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[11] The government also finds support in the language of Sections 416(h)(2)(B) and (h)(3)(C), which provide that a person will be deemed a "child" if he or she "is the son or daughter of [the] insured" and also satisfies other conditions. The government asserts that "[t]he terms 'son' and 'daughter,' which are not otherwise defined in the Act, refer to an applicant who is the natural (biological) child of the insured. But that biological relationship is not alone enough to qualify; the applicant must satisfy additional criteria." Gov't Br. 14. Therefore, the government concludes, if being an undisputed biological child makes one a "child" within the meaning of Section 416(e)(1), and that status is not alone enough to qualify a child for benefits, the Section 416(e)(1) definition cannot be determinative. This argument, however, does not advance the government's position, for two reasons. *First*, it is circular. The government *assumes* that the words "son" and "daughter" describe a child whose biological relationship with the insured person already has been established and is "'undisputed.'" Gov't Br. 15 (citations omitted) But the Act, which does not define son or daughter, does not say that. In fact, read in context Sections 416(h)(2)(B) and 416(h)(3)(C) appear to provide a means of *establishing* a proxy for a biological relationship, at a time when genetic paternity tests had not yet been developed and, absent marriage, establishing paternity in a manner regarded as determinative was impossible. *Second*, the government's argument is no answer at all to our submission that Section 416(e)(1) defines the biological child of a *married* couple to be a "child" entitled to benefits, as Sections 416(h)(2)(B) and (C) have no application to such children.

of the Act. Gov't Br. 16-22. The clarity of the Act's language makes that exercise unnecessary: "When the words of a statute are unambiguous," the "judicial inquiry is complete." *Conn. Nat'l Bank*, 503 U.S. at 254 (internal citations omitted). But the government's argument is, in any event, incorrect on its own terms.

1. The government misreads the 1965 legislative history.

The government first looks for support in the Senate Report accompanying the 1965 amendment that added Section 416(h)(3)(C) to the Act, which it quotes as stating that "'whether a child meets the definition of a child depends'" upon state intestacy law. Gov't Br. 17 (quoting S. Rep. No. 89-404, at 109 (1965)). But that one statement hardly proves the government's sweeping conclusion that "Congress understood—and agreed with—the proposition that under the pre-1965 version of the Act, children who could not inherit under applicable state intestacy law were ineligible for survivor benefits." Gov't Br. 18. To the contrary, Congress intended the 1965 amendment to address the specific case of children born out of wedlock, for whom it might be difficult to establish paternity. But Congress *assumed* that the biological children of married parents are eligible for benefits: In its description of the disparate treatment States offered illegitimate children, the Senate Committee observed that "[i]n some States a child whose parents never married can inherit property *just as if they had married*." S. Rep. No. 89-404, at 109 (emphasis added).

Nothing in this history demonstrates that Congress in 1965—let alone in 1939, when it enacted Sections 416(e)(1) and 416(h)(2)(A)—intended Sec-

tion 416(h)(2)(A) to trump Section 416(e)(1). The 1965 amendment sought to expand the availability of benefits in States with laws that were less generous to children born outside of marriage, including children in a "normal family relationship" whose "friends and neighbors have [no] reason to think that *the parents were never married*." S. Rep. No. 89-404, at 110 (emphasis added). The amendment was thus consistent with the Committee's belief that, "in a national program that is intended to pay benefits to replace the support lost by a child when his father retires, dies, or becomes disabled, *whether a child gets benefits should not depend on whether he can inherit his father's intestate personal property under the laws of the State in which his father happens to live*." *Ibid.* (emphasis added). This does not suggest a preference for state rather than national rules in determining the entitlement to benefits of the biological children of married parents. Instead, "[t]he report's reference to § 416(h)(2)(A) is simply a reference to an expanded scope of survivorship benefits reaching *beyond* marital children; not a suggestion that paragraph (2)(A) was *limiting* benefits granted via § 416(e)'s 'plain language' definition." *Schafer*, 641 F.3d at 68 (Davis, J., dissenting).

2. The Act's broader purposes favor entitlement to benefits for all biological children of married parents.

In addition, the government pays no attention at all to the fundamental purpose of the Act, which waged "a unified, well-rounded program of attack" on the "principal causes of destitution and want" for American families—including the "loss of the wage earner of the family." S. Rep. No. 74-628, at 2 (1935). The legislation was intended to be a "broad program"

to offer American families "security against the major hazards and vicissitudes of life." Address of the President of the United States, H.R. Doc. No. 74-01, at 3 (1935).

Of particular relevance here, Congress emphasized that "[a]ll parts of the [Act] are in a very real sense measures for the security of children." S. Rep. No. 74-628, at 16. "The heart of any program for social security must be the child." *Ibid.* At the time of initial enactment, the House committee focused on "[o]ne clearly distinguishable group of children * * * for whom better provision should be made": children "in families lacking a father's support." H.R. Rep. No. 74-615, at 10 (1935). And committees in both the House and Senate emphasized the importance of financial aid to such families, so that "it is possible to keep the young children with their mother in their own home." S. Rep. No. 74-628, at 17 (1935). The earliest version of Social Security legislation accordingly offered an annual appropriation to assist the States in offering relief to "needy dependent children." Nat'l Res. Planning Bd., Security, Work and Relief Policies 83 (1942), *available at* http://www.ssa.gov/history/reports/NRPB/NRPBChapter4b.pdf.

Four years later, Congress revisited the issue after a 1938 report by the Advisory Council on Social Security concluded that "there is great need for further protection of dependent children." Final Report of the Advisory Council on Social Security, S. Doc. No. 76-04, at 18 (1938). The Council criticized the 1935 program as offering aid that was "insufficient to maintain normal family life or to permit the children to develop into healthy citizens." *Ibid.* Further, because of the technical cut-offs of the need-based pro-

gram, "[m]any deserving cases are not able to obtain any aid." *Ibid.*

Among its reform recommendations, the Council proposed that dependent children and widows of a deceased wage earner receive survivor benefits as a matter of right. *Id.* at 17-18. The Council explained that such benefits would "sustain[] the concept that a child is supported through the efforts of the parent, [and] afford[] a vital sense of security to the family unit." *Id.* at 18. Congress ultimately approved the survivor benefits amendments to the Act, stating that the changes were "designed to afford more adequate protection to the family as a unit." H.R. Rep. No. 76-728, at 7 (1939). As we have noted, Congress expanded on this purpose in 1965.

From this history emerge two important concerns that historically have guided Congress in its approach to survivor benefits: (a) guaranteeing broad protection to children and their families against misfortune, and (b) offering *uniform* protection for such families in the form of aid that is neither funded nor controlled by the States, nor doled out unfairly because of strict state eligibility requirements. In particular, it makes perfect sense that Congress would define "child" beneficiaries independently from state law: Congress enacted the Social Security Act Amendments to make up for the States' paralysis in the wake of the Great Depression. This understanding is bolstered by Congress's decision in 1965 to further expand the Act's coverage, refusing to leave illegitimate children at the mercy of state intestacy law.

These concerns favor respondent here. As a law explicitly drafted "for the security of children" (S. Rep. No. 74-628, at 16 (1935)), the Act as applied to families in respondent's situation softens the impact

of life's misfortunes—in this case, the primary wage earner's untimely death. And it eases the expenses of keeping "the young children with their mother in their own home." *Id.* at 17. The ALJ in this case recognized as much, finding that "[t]here is little doubt * * * that a favorable decision [for respondent] would not be inconsistent with the intention of the statute." Pet. App. 45a.

Unsurprisingly given this history, courts consistently have construed the Act liberally in favor of coverage.[12] "In a close case, it is well to bear in mind that [the Act's] intent is inclusion rather than exclusion * * *." *Cohen* v. *Sec. of Dep't of Health and Human Servs.*, 964 F.2d 524, 531 (6th Cir. 1992). For over seventy years, settled judicial practice—which the government urges this Court to abandon—has been to construe the Act in favor of coverage if it is reasonable to do so, not "so as to withhold benefits in marginal cases." *Smith* v. *Heckler*, 820 F.2d 1093, 1095 (9th Cir. 1987).

In taking this approach, the lower federal courts followed this Court's lead in applying the "well-accepted principle that remedial legislation * * * is to be given a liberal construction consistent with the [Act's] overriding purpose." *United States* v. *Bacto-*

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[12] See, *e.g.*, *Cunningham* v. *Harris*, 658 F.2d 239 (4th Cir. 1981); *Broussard* v. *Weinberger*, 499 F.2d 969 (5th Cir. 1974); *Haberman* v. *Finch*, 418 F.2d 664 (2d Cir. 1969); *Combs* v. *Gardner*, 382 F.2d 949 (6th Cir. 1967); *Rodriguez* v. *Celebrezze*, 349 F.2d 494 (1st Cir. 1965); *Dvorak* v. *Celebrezze*, 345 F.2d 894 (10th Cir. 1965); *Celebrezze* v. *Bolas*, 316 F.2d 498 (8th Cir. 1963); *Ewing* v. *Risher*, 176 F.2d 641 (10th Cir. 1949); *Henry Broderick, Inc.* v. *Squire*, 163 F.2d 980 (9th Cir. 1947); *Carroll* v. *Social Sec. Bd.*, 128 F.2d 876 (7th Cir. 1942).

Unidisk, 394 U.S. 784, 798 (1969).[13] As this Court noted, "[t]he hope behind this statute is to save men and women from the rigors of the poor house as well as from the haunting fear that such a lot awaits them when journey's end is near." *Helvering* v. *Davis*, 301 U.S. 619, 641 (1937). Such an ambitious objective counsels interpreting the Act's provisions expansively to achieve the end sought by Congress.

3. The policy rationales invoked by the government offer it no support.

In arguing instead for a narrow construction of the Act that denies benefits to posthumously conceived children, the government asserts that any other interpretation would be (a) "inconsistent with the principles of federalism" and (b) "poorly tailored to 'the Act's basic aim of primarily helping those children who lost support after the unanticipated death of a parent.'" Gov't Br. 21 (quoting *Schafer*, 641 F.3d at 58). Neither assertion accurately states the congressional purpose.

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[13] This is a general principle that has been applied to a wide range of remedial statutes. See, *e.g.*, *Clarke* v. *Sec. Indus. Ass'n*, 479 U.S. 388, 395 (1987) (Administrative Procedure Act "should be construed 'not grudgingly but as serving a broadly remedial purpose'"); *Atchison, Topeka and Santa Fe Ry.* v. *Buell*, 480 U.S. 557, 562 (1987) (Federal Employers' Liability Act "recognized generally" as a "broad remedial statute" and thus given a "'standard of liberal construction in order to accomplish [Congress's] objects'"); *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 268 (1977) (Longshoremen's and Harbor Workers' Compensation Act should be read liberally because "such a construction is appropriate for this remedial legislation"); *Tcherepnin* v. *Knight*, 389 U.S. 332, 336 (1967) (Securities Exchange Act "should be construed broadly to effectuate its purposes").

a. The government doubtless is correct that "[t]he Act contains nothing to suggest that Congress wished to depart from its usual practice by displacing state law and creating a federal rule governing parent-child relationships." Gov't Br. 31. But that is beside the point, because the claim here would not displace state law in any respect; it concerns the meaning of the terms governing entitlement to a federal benefit. The government thus cannot suggest that Congress stepped on state toes when—as the government acknowledges—it created a federal rule governing the payment of benefits to adopted children, stepchildren, grandchildren, stepgrandchildren, and the children of defectively married or unmarried parents addressed in Sections 416(h)(2)(B) and 416(h)(3)(C). Its treatment of the biological children of married parents is no different.

In fact, Congress has treated the Act's various child aid provisions less as an exercise in federalism than a response to the States' inability to provide adequate relief to dependent children during the Great Depression and their patchwork intestacy regimes, which left deserving but illegitimate children ineligible for survivor benefits until the 1960s.[14]

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[14] In its key 1935 committee report on the Social Security Act, the House Ways and Means Committee noted the need for federal intervention because the States could not adequately provide for their dependent children: "Forty five States now have laws providing such aid, *but in many of these States the laws are only partially operative or not at all so.* With *the financial exhaustion of State and local governments* a situation has developed in which there are more than three times as many families eligible for such aid as are actually in receipt of it * * *." H.R. Rep. No. 74-615, at 10 (1935) (emphasis added).

The federal government—not the States—operates and funds the program, dispensing benefits out of the Old Age and Survivors' Insurance Trust Fund. 42 U.S.C. § 401; see *Old Age and Survivors' Insurance Trust Fund*, SOCIAL SECURITY ONLINE: OFFICE OF THE CHIEF ACTUARY, http://www.ssa.gov/OACT/ProgData/describeoasi.html (last visited Jan. 29, 2012). The federal definition of "child" thus does not encroach on any state interest in controlling costs or protecting the integrity of its relief rolls. In this context, no State has an interest in relying on its own law as a means of "allocating its limited resources * * *, reduc[ing] the caseload of its social workers and provid[ing] increased benefits to those still eligible for assistance." *King* v. *Smith*, 392 U.S. 309, 318 (1968).

Nor can the government evade the clear language of the Act through a rote appeal to background principles of federalism. Although the government is correct that "domestic relations are preeminently matters of state law" (*Mansell* v. *Mansell*, 490 U.S. 581, 587 (1989)), it overlooks that "[t]he *scope of a federal right* is, of course, a *federal question* * * *." *De Sylva* v. *Ballentine*, 351 U.S. 570, 580 (1956) (emphasis added). When (as here) Congress enacts a statute creating a federal benefits program, it is Congress's text and purpose that ultimately determine who qualifies as a rights-holder under the law. And as we make clear above, Congress unmistakably supplied a core definition of "child" that is independent of state law. "Principles of federalism cannot narrow [the Act's] clear scope." *CSX Trans., Inc.* v. *Ala. Dep't of Rev.*, 131 S.Ct. 1101, 1112 (2011).

In addition, the usual reasons for deference to state domestic relations law are absent here. This is

not a case in which federal law threatens to usurp the States' settled powers over domestic affairs, family status, or probate law. Notably absent are the thorny questions arising when federal courts are presented with issues such as divorce, alimony, or child custody—areas in which the States are historically presumed to possess unique authority and competence as the sovereign "which created those legal relationships." *De Sylva*, 351 U.S. at 580; *Ankenbrandt* v. *Richards*, 504 U.S. 689, 703-704 (1992). And this case raises no "delicate issues of domestic relations" better left "to the state courts." *Elk Grove Unified School Dist.* v. *Newdow*, 542 U.S. 1, 13 (2004). States will remain free to regulate posthumous conception in whatever manner they see fit, and can craft their state inheritance laws and state benefit policies accordingly.

b. The government also contends that denying posthumously conceived children benefits under the Act is consistent with the goal of awarding survivor benefits only when death of the insured individual was "unanticipated." Gov't Br. 21-22. But this argument is internally inconsistent, lacks a statutory basis, and undermines the purpose of the Act.

First, the Act undoubtedly provides benefits to children conceived by couples who are fully aware at the time of conception that one of the parents will soon die and be unable to support the child. The government does not dispute that if Karen Capato conceived the twins naturally before Nick Capato died—even after a warning that Nick's early death was inevitable—the children would be eligible for benefits under the Act and state intestacy law. Similarly, if Karen had conceived through IVF before Nick died—with full knowledge that he would not survive to

support the children—the twins would be eligible for benefits. Thus, the government's position leads to this result: if Karen successfully conceived the day before her husband died, the twins would be eligible for benefits; but because she continued the course of IVF after his death, the twins are not eligible. There is no reason to believe that Congress drew such an irrational distinction.

Second, the government's "unanticipated loss" rationale cannot be squared with this Court's rejection of the same argument in the disability benefits context in *Jimenez* v. *Weinberger*, 417 U.S. 628 (1974). In *Jimenez*, the Court considered whether illegitimate children born after the onset of a disability could be eligible for child's insurance benefits. The government presented much the same argument that it raises here: It contended that the Act's purpose was "to replace only that support enjoyed *prior to the onset of disability*; no child would be eligible to receive benefits unless the child had experienced actual support from the wage earner prior to the disability, and no child born after the onset of the wage earner's disability would be allowed to recover." *Id.* at 634 (emphasis added). The Court rejected that argument, concluding: "We do not read the statute as supporting that view of its purpose." *Ibid.* Instead, the Court held that "the primary purpose of the contested Social Security scheme is to provide support for dependents of a disabled wage earner" and that granting benefits to children born after the parent became disabled was consistent with that goal. *Ibid.*

There is thus no basis for the government's derisive contention that granting benefits to posthumously conceived children amounts to "'subsidizing the continuance of reproductive plans.'" Gov't Br. 22

(citation omitted). As noted above, the Court in *Jimenez* clearly did not regard granting benefits to disabled workers' children as "subsidizing reproductive plans." For practical reasons, the subsidy analogy is even more inappropriate here, where couples must invest significant fiscal and emotional resources in the IVF process. As the ALJ noted in this case, "[t]here is no ulterior motive here and *the amount of expense to which the parents went in order to conceive the children is clearly more than they might ever receive as Social Security benefits.*" Pet. App. 44a (emphasis added).

Third, the government's construction of the Act takes no account of the complex, real-world hardships that families face when a wage-earner's death is looming. This case highlights the painful uncertainties that families face during these times. After Nick was diagnosed with cancer in 1999, the Capatos began the IVF process in April 2000. Pet. App. 18a. A year later, Nick's doctor said he was responding to aggressive treatment and "doing quite well." *Id.* By Thanksgiving 2001, the cancer had returned and Nick was faring poorly. *Id.* He died in March 2002, and Karen completed IVF shortly afterward. Pet. App. 19a.

In such circumstances, the Capatos and families like them will have invested substantial effort, money, and planning in assisted reproduction *before* the wage earner passes away. And the time when IVF treatment will be successful cannot be precisely predicted. If a woman in Karen's situation begins treatment before her husband dies, it makes no sense to base her children's right to benefits on whether they were fortunate enough to be conceived before their father passed away. Indeed, such a rule creates per-

verse incentives for such women, who may feel compelled to begin IVF immediately, before their husbands have died, simply because their children will miss out on benefits if they do not. The Social Security Act, which assists families like the Capatos by offering "security against the major hazards and vicissitudes of life" (Address of the President of the United States, H.R. Doc. No. 74-01, at 2-4 (1935)), does not require such a result.

4. The government's construction of the Act raises serious constitutional concerns.

Finally, if doubt remains about the meaning of the Act, the Court should affirm the Third Circuit's reading to avoid serious equal protection issues that are presented by the government's proposed rule.[15] It is fundamental that "an act of Congress ought not be construed to violate the Constitution if any other possible construction remains available." *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979); see also, *e.g.*, *Nw. Austin Mun. Util. Dist. No. 1* v. *Holder*, 129 S. Ct. 2504, 2513 (2009); *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932). Because the government's reading of the Act "would raise a multitude of constitutional problems" (*Clark* v. *Martinez*, 543 U.S. 371, 380-381 (2005)), the Court—if it regards our textual argument as a "fairly possible" one (*Crowell*, 285 U.S. at 62)—should follow that course here.

Under the government's interpretation of the Act, posthumously conceived children are treated as an inferior subset of natural children who are ineli-

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[15] The Third Circuit affirmed dismissal of respondent's Equal Protection challenge to the denial of benefits to posthumously conceived children. Pet. App. 4a n.1.

gible for government benefits simply because of their date of birth and method of conception. Yet posthumously conceived children are otherwise similarly situated to children who are eligible to receive survivor or disability benefits. For example, a child born after a wage earner has already stopped working and has started receiving disability payments may qualify for survivor benefits under the Act, even though the event establishing eligibility for benefits occurred before the child's birth. *Jimenez*, 417 U.S. at 634-635.

Such a reading of the Act should not survive intermediate scrutiny under the equal protection component of the Fifth Amendment, which requires that "a statutory classification * * * be substantially related to an important governmental objective." *Clark* v. *Jeter*, 486 U.S. 456, 461 (1988). This Court has "[struck] down discriminatory laws relating to status of birth where—as in this case—the classification is justified by no legitimate state interest, compelling or otherwise," *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 176 (1972) (holding the unequal treatment of illegitimate children by Louisiana's worker's compensation law unconstitutional under the Fourteenth Amendment). Birth method, like illegitimacy, is an immutable characteristic over which posthumously conceived children have no control. See *Matthews* v. *Lucas*, 427 U.S. 495, 505 (1976). Posthumously conceived children also share a history of discrimination, stigma, and legal handicaps with other children born and raised in nontraditional families. Julie E. Goodwin, *Not All Children Are Created Equal: A Proposal To Address Equal Protection Inheritance Rights of Posthumously Conceived Children*, 4 Conn. Pub. Int. L.J. 234, 273 (2005). For these reasons, discriminating against posthumously conceived children is "contrary to the basic concept of

our system that legal burdens should bear some relationship to individual responsibility or wrongdoing." *Weber*, 406 U.S. at 175. Children should not be penalized for their parents' reproductive choices. See *ibid.*

Yet no important government objective for this classification of natural children exists. First, denying posthumously conceived children benefits cannot be justified on the ground that the Act's purpose is simply to replace income lost due to *unanticipated* death or injury; as we have noted, the Court rejected this narrow view in *Jimenez*, 417 U.S. at 634. Similarly, children adopted by a surviving spouse can, under certain circumstances, claim survivor benefits as the adopted children of the deceased wage earner. 20 C.F.R. 404.356. And grandchildren adopted by one grandparent after the death of that grandparent's spouse may also qualify for survivor benefits. 20 C.F.R. 404.358. In all of these cases, the "unanticipated" nature of the tragedy is not dispositive; it should not be so here.

Second, denying posthumously conceived children benefits is unnecessary to stop spurious claims. Advances in technology now generally make proof of paternity a straightforward affair, and the carefully monitored steps taken at each stage of assisted reproduction make proof of paternity in such cases, if anything, considerably *easier* than in cases of natural conception. Less restrictive means exist to prevent abuses of the system than barring an entire class of children from receiving survivor benefits. Goodwin, *Not All Children Are Created Equal*, at 280-282 (proposing alternative schemes). In these circumstances, where constitutional concerns vanish

under the reading of the Act adopted by the court below, this Court should affirm that holding.

D. The Social Security Administration's Interpretation Of The Act Is Not Entitled To Deference.

The government ultimately retreats to an argument from deference under step two of the *Chevron* analysis. Gov't Br. 22-26. But that contention cannot save its reading of the Act.

1. To begin with, under step *one* of *Chevron* the Court will first consider whether "the statute is silent or ambiguous with respect to the specific issue." *Chevron U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). As the Court has explained, "[w]e only defer * * * to agency interpretations of statutes that, applying the normal 'tools of statutory construction,' are ambiguous." *INS* v. *St. Cyr*, 533 U.S. 289, 320 n.45 (2001) (quoting *Chevron*, 467 U.S. at 843 n.9); see *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 446-447 (1987). And here, for the reasons we have explained, the ordinary tools of statutory construction show the text of the Act to be wholly *un*ambiguous, leaving no room for the exercise of agency discretion. See also Pet. App. 11a n.5 (quoting *Chevron*, 467 U.S. at 842-843); *Gillett-Netting*, 371 F.3d at 596-597 (finding that the Section 416(e) definition of "child" controlling and declining to defer to the agency's contrary view).

2. Moreover, even if the Court were to find the Act ambiguous in its treatment of the undisputed biological children of married parents, the government's interpretation fails because it is arbitrary and capricious. The Social Security Administration treats such children differently, and less favorably, than

adopted children, stepchildren, grandchildren, and stepgrandchildren when determining eligibility for survivor benefits. For all of these categories of children, the government relies exclusively on the terms of Section 416(e) to determine eligibility for benefits; only biological children are subjected to the stiffer requirements of Section 416(h)(2)(A). 20 C.F.R. 404.355-404.359; see *Beeler* v. *Astrue*, 651 F.3d 954, 960 (8th Cir. 2011) ("The regulations provide different sets of qualifications for adopted children, stepchildren, grandchildren, and stepgrandchildren, who—unlike natural children—are not required to satisfy one of the relevant provisions of § 416(h).").

This unjustified and inequitable distinction in the Social Security Administration's regulations interpreting Sections 416(e) and 416(h) can lead to less favorable outcomes for biological children than for other children. The agency, following its regulations and interpretive manual, would prevent the posthumously conceived biological child of a married couple from qualifying for survivor benefits without recourse to state intestacy law. Yet the same regulations permit a grandchild legally adopted "by the insured's surviving spouse after his or her death" to be considered an "adopted child" in satisfaction of Section 416(e), without reference to state law. 20 C.F.R. 404.358. Similarly, a child adopted after the insured's death by his or her surviving spouse may be considered the insured's legally adopted child based on state adoption law rather than state intestacy law. 20 C.F.R. 404.356. Because the government's position "acknowledge[s] § 416(e)'s force with respect to every listed relation but one," and offers no rationale for that distinction, it is an "irrational" construction of the statute not entitled to deference. *Schafer*, 641 F.3d at 68 (Davis, J., dissenting).

3. In addition, the Social Security Administration's Program Operations Manual System ("POMS"), the chief source of the government's construction of the Act in this case, also should not receive deference, as an interpretation either of the Act or of the Social Security Administration's own regulations. The POMS specifies that a "child conceived by artificial means after the [insured's] death cannot be entitled under the Federal law provisions of the Act" and "can only be entitled if he or she has inheritance rights under applicable State intestacy law." SSA, POMS GN 00306.001(C)(1)(c), https://secure.ssa.gov/apps10/poms.nsf/lnx/0200306001.

In seeking deference for this pronouncement, the government invokes *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997), "to the extent [the POMS] reflects an interpretation of the SSA's own regulations." Gov't Br. 25-26. But *Auer* has no application here. Its rule comes into play only when the meaning of an agency's regulation is in dispute, in circumstances where "the language of the regulation is ambiguous." *Christensen* v. *Harris Cnty.*, 529 U.S. 576, 588 (2000). *Auer* deference is *not* warranted where, as here, the government has made no arguments to support the conclusion that its *regulations*—as opposed to the Act itself—are ambiguous.

Deference under *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 139-140 (1944), is the best the government can hope for when the POMS provision is correctly viewed as an agency construction of the Act. See Gov't Br. 25; *United States* v. *Mead Corp.*, 533 U.S. 218, 234 (2001). Still, regardless of the applicable standard of deference, the POMS provision cannot justify setting aside the plain language and meaning of the statute. Indeed, the single instance cited by

the government of this Court deferring to the POMS (Gov't Br. 25) highlights this point. In *Washington State Dep't of Soc. & Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U.S. 371 (2003), the Court acknowledged the persuasive force of a provision of the POMS "in closing the door on any suggestion that the usual rules of statutory construction should get short shrift * * *." *Id.* at 385. But here, the usual rules of statutory construction lead to a markedly different conclusion from the interpretation of the Act propounded in the POMS and now offered to this Court by the government.

4. A final point bears emphasis. Congress doubtless did not have in mind the range of assisted reproductive technologies that are now available when it wrote Sections 416(e) and 416(h)(2)(A) in 1939. But Congress drafted language that established a clear principle: that the undisputed biological child of a married couple is the "child" for statutory purposes of each of the parents. The world has changed since then, but the meaning of those words has not. There surely can be no doubt, for example, that a child whose conception is assisted through reproductive technology like IVF or artificial insemination at a time when both parents are alive is the "child" of each parent for purposes of the Act[16]; that conception occurred some months after the father's death does not make that son or daughter any less his or her father's "child."

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[16] Artificial insemination was not unknown at the time Congress wrote the Act. See Kay Elder, Julie Ribes & Doris Baker, *Infections, Infertility, and Assisted Reproduction* 7-8 (2004); Allen D. Holloway, *Artificial Insemination: An Examination of the Legal Aspects*, 43 Am. Bar Ass'n J. 1089, 1090 (1957).

If advances in technology lead to a result that was not anticipated by Congress in 1939, the courts and the Commissioner do not have license to depart from the statutory text; any change must come from Congress. As Justice Frankfurter noted: "In a democracy the legislative impulse and its expression should come from those popularly chosen to legislate, and equipped to devise policy, as courts are not. The pressure on legislatures to discharge their responsibility with care, understanding and imagination should be stiffened, not relaxed." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 545 (1947). Or, as the Court put it more recently: "It is not for us to speculate, much less act, on whether Congress would have altered its stance had the specific events of this case been anticipated." *TVA* v. *Hill*, 437 U.S. 153, 185 (1978); see also *Lewis* v. *City of Chicago*, 130 S. Ct. 2191, 2199-2200 (2010) ("It is not for us to rewrite the statute so that it covers only what we think is necessary to achieve what we think Congress really intended.").

To be sure, as the government notes, new technology makes possible more complicated situations, involving such innovations as donor eggs and sperm, and surrogate wombs. Gov't Br. 11, 21, 22. But these circumstances are not presented here. The Capato children are the biological son and daughter of a father who was married to their mother. It is enough to resolve this case for the Court to recognize that these children are the paradigm of the "child" defined by Section 416(e)(1)[17]—and "if it is not neces-

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[17] "Like any word, the word 'child' comprises both a core of relations it clearly encompasses and a hazy periphery where the label becomes increasingly contested." *Schafer*, 641 F.3d at 65

sary to resolve more, it is necessary not to resolve more." *PDK Labs, Inc.* v. *U.S. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring). The Court should apply the plain language of the Act, as did the Third Circuit, and reserve for another day the more exotic questions raised by the government.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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(Davis, J., dissenting). This case lies at the core of the statutory definition.

REPLY BRIEF

No. 11-159

In the Supreme Court of the United States

MICHAEL J. ASTRUE,
COMMISSIONER OF SOCIAL SECURITY, PETITIONER

v.

KAREN K. CAPATO, ON BEHALF OF B.N.C., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

No. 11-159

MICHAEL J. ASTRUE,
COMMISSIONER OF SOCIAL SECURITY, PETITIONER

v.

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REPLY BRIEF FOR THE PETITIONER

This case involves the application of Title II of the Social Security Act (the Act), 42 U.S.C. 401 *et seq.*, to a claim for child survivor benefits asserted on behalf of children who were conceived after the death of their biological father. Respondent argues (Br. 41) that the decision of the Social Security Administration (SSA) denying benefits fails to take account of the "complex, real-world hardships" confronting families in her situation. SSA, however, must apply the statute that Congress enacted, and the statute in fact does take account of potential hardships by limiting survivor benefits to applicants who are likely to have been dependent on the deceased wage earner.

Under 42 U.S.C. 402(d), "[e]very child (as defined in section 416(e) of this title) * * * of an individual who dies a fully or currently insured individual," is eligible

for Social Security survivor benefits, and under 42 U.S.C. 416(e), the term "child" includes "the child or legally adopted child of an individual," as well as stepchildren, grandchildren, and stepgrandchildren who satisfy certain criteria. Although Section 416(e) does not further define "child," Section 416(h) does: "In determining whether an applicant is the child * * * of a fully or currently insured individual for purposes of this subchapter, the Commissioner of Social Security shall apply such law as would be applied in determining the devolution of intestate personal property * * * by the courts of the State in which [the insured] was domiciled at the time of his death." 42 U.S.C. 416(h)(2)(A). Based on its interpretation of the statute ever since the survivor provisions were enacted in 1939, SSA has correctly concluded that, in determining whether an applicant in the position of respondent's children is the "child" of an insured wage earner, the agency must apply state intestacy law. Because the applicable state law (Florida law) does not confer intestacy rights in this context, respondent's children are not entitled to survivor benefits.

The court of appeals' contrary interpretation cannot be reconciled with the text of the statute, and respondent's efforts to defend it are unavailing. Central to respondent's argument is the suggestion (Br. 9) that the term "child" in Section 416(e)(1) should be read to mean "the biological child of married parents." But neither a limitation to married parents nor a focus on biology has any basis in the relevant statutory text. In any event, respondent's theory founders because a marriage ends when one spouse dies, and therefore the children in this case are not the children "of married parents."

Respondent's arguments based on legislative history and policy fare no better. Nor is she correct that application of state intestacy law to deny survivor benefits to posthumously conceived children somehow raises concerns under the equal protection component of the Due Process Clause. Finally, even if the statute were susceptible to respondent's interpretation, respondent identifies no basis for setting aside the agency's longstanding contrary view, which is set out in published regulations that are entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984).

A. Respondent's "Plain Meaning" Argument Lacks Merit

Like the court of appeals, respondent argues that SSA should ignore Section 416(h)(2)(A)'s directive that the agency look to state intestacy law to "determin[e] whether an applicant is the child or parent of a fully or currently insured individual." In her view (Br. 9), analysis of the statute should instead begin and end with Section 416(e), which states that "[t]he term 'child' means * * * child," 42 U.S.C. 416(e)(1), and it should reflect what she describes as the ordinary meaning of the word "child." As respondent appears to recognize, the ordinary meaning of "child" is "son or daughter" or "the immediate progeny of human parents." Br. 13 (quoting *Webster's New International Dictionary* 465 (2d ed. 1934)). But respondent does not argue that the statute incorporates those definitions, perhaps because they would render much of the Act superfluous. For example, Sections 416(e)(2) and (e)(3) extend "child" status under the Act to certain adopted children, even though they already fall within the ordinary meaning of "sons" or "daughters." Likewise, several provisions of Section 416(h) extend "child" status to certain "sons" and

"daughters" born to unmarried parents, even though they are indisputably "the immediate progeny of human parents." See Gov't Br. 14-15.

Instead, respondent contends (Br. 9) that "Congress used the word 'child' in [Section 416(e)(1)] to mean the biological child of married parents." Respondent's argument depends on that proposition, but it is flawed in three respects. First, nothing in the statute suggests that Congress understood the word "child" to refer only to the children of married parents. Second, nothing in the statute suggests that Congress intended biological parentage to be determinative of "child" status. Third, even under respondent's own definition, posthumously conceived children would not qualify for "child" status because, under Florida law, they are not children of married parents.

1. Respondent acknowledges (Br. 13) that the ordinary meaning of "child," in 1939 as today, includes all human offspring. See 2 *Oxford English Dictionary* 342 (1933) ("The offspring, male or female, of human parents; a son or daughter"). In support of a narrower definition, respondent cites (Br. 12) the second edition of *Webster's New International Dictionary* for the proposition that "child" was sometimes used in a specialized legal sense of "legitimate offspring," that is, children born to married parents. But none of the other definitions cited by respondent includes a marital limitation, and respondent offers no reason to believe that Congress understood the word "child" in that limited sense.

To the contrary, in creating the system of child survivor benefits in 1939, Congress expressly distinguished between "legitimate" children and other children. In particular, the dependency provision included by Congress provided that "[a] child shall be deemed depend-

ent upon a father or adopting father" unless the father or adopting father "was not living with or contributing to the support of such child" and, *inter alia*, "such child is neither the legitimate nor adopted child of such individual." Social Security Act Amendments of 1939, ch. 666, § 201, 53 Stat. 1364 (42 U.S.C. 402(c)(3)(A) (1940)); see 42 U.S.C. 402(d)(3) (current version). Other contemporaneous statutes similarly used the term "legitimate child" to mean something different from the unmodified term "child." See, *e.g.*, Servicemen's Dependents Allowance Act of 1942, ch. 443, § 120, 56 Stat. 385 (defining "child" to include "legitimate child," "child legally adopted," and, under certain conditions, "stepchild" and "illegitimate child"); see also Armed Forces Leave Act of 1946, ch. 931, § 2(d), 60 Stat. 963; Act of July 13, 1943, ch. 233, § 7, 57 Stat. 555; Act of Feb. 21, 1929, ch. 288, 45 Stat. 1254. If respondent's understanding of the ordinary meaning of "child" were correct, Congress's use of the word "legitimate" in those statutes would have made little sense.

Respondent notes (Br. 14 n.3) that some other contemporaneous statutes used the word "child" without defining it. That fact may support respondent's inference (*ibid.*) that "the word 'child' has a settled meaning in common usage," but that common meaning is not the one respondent urges repeatedly throughout her brief: that Section 416(e)(1)'s definition of "child" refers only to the children of married parents. Instead, to the extent the marital status of a child's parents has any relevance to the determination of "child" status under the Act, it is only because Section 416(h)(2)(A) requires reference to state intestacy law, which may in some cases take account of marital status.

2. Respondent's emphasis on "biological" parentage is also misplaced. Today, biological paternity can be proved scientifically, but historically, proof of paternity was difficult. See *Nguyen* v. *INS*, 533 U.S. 53, 62-63 (2001). In 1939, there was no such thing as a scientifically proven biological relationship between a child and a father, which is no doubt part of the reason that the word "biological" appears nowhere in the Act.

Moreover, even today, biological parentage is not always the basis for a *legal* child-parent relationship. Most obviously, an individual's biological child may have been adopted by someone else. See, *e.g.*, Unif. Probate Code § 2-119(a) (amended 2008), 8 U.L.A. 55 (Supp. 2011) (setting out a general rule that "a parent-child relationship does not exist between an adoptee and the adoptee's genetic parents"). In addition, as a result of the increasing development and use of assisted reproduction technology, many States have developed new laws for determining paternity (and maternity) in the contexts of surrogacy and of sperm, egg, and embryo donation. Those laws do not necessarily make biological parentage determinative. See, *e.g.*, Cal. Fam. Code § 7613(b) (West Supp. 2012) ("The donor of semen * * * for use in artificial insemination or in vitro fertilization of a woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived, unless otherwise agreed to in a writing signed by the donor and the woman prior to the conception of the child."); Mass. Ann. Laws ch. 46, § 4B (LexisNexis 2006) ("Any child born to a married woman as a result of artificial insemination with the consent of her husband, shall be considered the legitimate child of the mother and such husband."); see also *In re C.K.G.*, 173 S.W.3d 714, 727-728 (Tenn. 2005) (holding that a

woman who bore a child using donor eggs was the child's legal mother, and explaining that "where a woman has become intimately involved in the procreation process even though she has not contributed genetic material, factors other than genetics take on special significance"). And of particular relevance here, as explained in the government's opening brief (at 20-21), the biological relationship between a posthumously conceived child and a deceased biological parent is generally insufficient, by itself, to establish a legal child-parent relationship under the laws of most States.

In short, even though biological paternity can now be determined to a high degree of accuracy, there is no basis for concluding that Congress, in 1939, contemplated that a biological relationship would be sufficient by itself to establish "child" status for purposes of receiving Social Security survivor benefits.

3. In any event, even if respondent were correct that the word "child" in Section 416(e)(1) refers to the biological child of married parents, it would still be necessary to look to state law to determine whether the parents of a putative "child" were in fact married. Cf. 42 U.S.C. 416(h)(1)(A)(i) (referring to state law to determine whether an applicant is the "wife" or "husband" of an insured individual). By definition, posthumously conceived children are conceived after the death of at least one of their parents, and in Florida—as in every other State—a marriage ends upon the death of a spouse. See *Sahler* v. *Sahler*, 17 So. 2d 105, 107 (Fla. 1944) ("[T]he marital relation, being a purely personal one, is terminated by the death of either of the parties.") (quoting *Price* v. *Price*, 153 So. 904, 905 (Fla. 1934)); accord *Jaris* v. *Tucker*, 414 So. 2d 1164, 1166 (Fla. Dist. Ct. App. 1982). Respondent therefore errs in asserting (Br. 13)

that "under the ordinary meaning of the word as used in 1939 (and today), the Capato twins are the marital 'children' of their biological father." Because the children in this case were conceived after the death of their father, they are not "marital" children in the sense suggested by respondent, so they would not be entitled to "child" status even under respondent's interpretation of the Act.

B. Respondent's Other Textual Arguments Are Flawed

1. According to respondent (Br. 16), "it would be most peculiar if Congress expected the definition of 'child' in Section 416(e)(1) * * * to require supplementation from some other part of the Act" when the status of "every adopted child, stepchild, grandchild, and stepgrandchild" "is determined *solely* by reference to the Section 416(e) definition." Respondent overlooks, however, that the remainder of Section 416(e) sets forth at great length the precise circumstances under which applicants will be regarded as qualifying adopted children, stepchildren, grandchildren, or stepgrandchildren, as well as the circumstances under which such individuals will qualify for "child" status. It would have been more peculiar for Congress to define adopted children, stepchildren, grandchildren, and stepgrandchildren so precisely in Section 416(e) but not to provide any additional definition for "child" beyond the tautology that "'child' means * * * child." While respondent suggests (*ibid.*) that the words "stepchild" and "grandchild" are "no less tautological in this context, than the word 'child,'" that is incorrect. Because no other provision in the Act purports to define "stepchild" or "grandchild," there is no reason to look beyond Section 416(e) in determining the meaning of those terms. By contrast, al-

though Section 416(e)(1) does not further define "child," Sections 416(h)(2) and (h)(3)(C) do provide instructions on how to determine whether an applicant "is the child" or is deemed to be the child of a wage earner. There is no basis for ignoring those provisions in applying Section 416(e)(1).

Respondent also asserts (Br. 20) that SSA's interpretation of the Act affords "different and less favorable treatment to the biological children of a married couple than to that couple's adopted or stepchildren, or to their grandchildren." Contrary to respondent's assumption, however, benefits are not automatically available to the members of the other "child" categories under Section 416(e); those children must satisfy the detailed requirements set forth in Section 416(e). In any event, legally adopted children, by definition, have a legal child-parent relationship with their adopted parents. On the other hand, as noted above, not all biological children have a legal child-parent relationship with their biological parents. So even if the Act did "automatically" (*ibid.*) provide benefits to legally adopted children but not biological children, the distinction would be sensible.

2. a. Respondent observes (Br. 18) that, under SSA's reading of the statute, Section 416(h) does not require application of state intestacy law in determining the status of adopted children, stepchildren, grandchildren, or stepgrandchildren. Based on that observation, she infers that SSA "agrees with [her] reading of the statute," *i.e.*, that Section 416(h) is not an exclusive test for "child" status. Br. 19 (emphasis omitted).

That argument rests on a misunderstanding of SSA's interpretation. In fact, Section 416(h)(2)(A) defines the *second* "child" in Section 416(e), which states that "[t]he term 'child' means (1) the child * * * of an individual,"

as well as other specified individuals. As the agency's regulations explain, Section 416(e)'s definition allows for the provision of benefits to "a natural child, legally adopted child, stepchild, grandchild, stepgrandchild, or equitably adopted child," 20 C.F.R. 404.354, and status as a "natural child" is determined by state intestacy law or one of the alternatives in Section 416(h)(2)(B) and (3)(C), see 20 C.F.R. 404.355(a)(1)-(4). In other words, Section 416(h)'s test *is* exclusive with respect to a "child" under Section 416(e)(1).

Respondent also relies on the second sentence of Section 416(h)(2)(A), which provides that "[a]pplicants who according to [state intestacy] law would have the same status relative to taking intestate personal property as a child or parent shall be deemed such." According to respondent (Br. 21), that sentence "is nonsensical unless the word 'child' has independent force and is given the meaning" of a biological child of married parents. That is incorrect. The quoted sentence reflects that Congress chose to defer to state law on "child" and "parent" status, and that individuals who have the inheritance rights of children or parents under state law are to be treated as children or parents for purposes of the Act. But the background definition of "child" or "parent" is provided by state law, and no additional definition is necessary.

b. Respondent argues (Br. 23-25) that because all biological children of married parents have intestacy rights, there would have been no reason for Congress to require the extra step of looking at state intestacy law to determine the status of such children, and therefore Section 416(h)(2)(A) must apply only to the children of unmarried parents. The premise of that reasoning is inconsistent with respondent's view that the children in

this case are the biological children of married parents, since it is undisputed that they do *not* have inheritance rights under Florida intestacy law. That discrepancy highlights a problem that pervades respondent's argument: under Florida law, posthumously conceived children are not the children of married parents. In addition, respondent's argument rests on the unsupported assumption that the biological parentage of non-marital children is always uncertain while the biological parentage of marital children is necessarily undisputed. See Br. 25 ("Congress meant Section 416(h)(2) to provide a means to overcome uncertainty about parentage."). An unmarried couple can agree that a child is theirs, while the parentage of a child born to a married couple may be disputed. Respondent errs in treating "marital" and "undisputed" as having the same meaning.

c. For the same reason, respondent errs in relying on Section 416(h)(2)(B), which extends "child" status to an individual whose parents "went through a marriage ceremony resulting in a purported marriage between them which, but for a legal impediment * * * would have been a valid marriage." According to respondent (Br. 26 n.10), that provision undermines the government's interpretation because it means that respondent's children could establish their eligibility if only their parents' marriage had been invalid. Here again, respondent overlooks that, at the time the children in this case were conceived, no "valid marriage" existed because the marriage had ended upon Mr. Capato's death.

d. Respondent also relies (Br. 22-23) on Section 402(d)'s cross-reference to Section 416(e), which, she says, demonstrates that if Congress had intended to incorporate Section 416(h) into Section 402(d)(1), it

would have done so expressly. But the cross-reference to Section 416(e) in Section 402(d) serves to clarify that the Act provides benefits to the grandchildren, stepchildren, and others described in that provision. There is no need for Section 402(d) to cross-reference Section 416(h) in addition because that provision, by its own terms, is already incorporated into Section 416(e)(1)'s definition of "child." The introduction to Section 416 provides that its definitions apply "[f]or the purposes of this subchapter," and Section 416(h)(2)(A) plainly states that the Commissioner "shall" apply state intestacy law in determining whether an applicant is a "child" for those purposes, including Section 416(e).

3. Respondent's interpretation of the Act also renders Sections 416(h)(2)(B) and (h)(3)(C) superfluous. See Gov't Br. 14-15. Those provisions state that an applicant who is ineligible to inherit under state law may nevertheless be deemed a "child" if he or she "is the son or daughter of [the] insured" and satisfies certain other criteria. 42 U.S.C. 416(h)(2)(B) and (3)(C). The biological relationship of being a "son or daughter" is not alone enough to qualify as a "child" for purposes of receiving survivor benefits; the applicant must satisfy additional criteria. Respondent's answer to that observation (Br. 30 n.11) is simply to repeat her atextual argument that Sections 416(h)(2) and (h)(3) somehow only apply to children whose parents are unmarried.

Respondent also argues (Br. 27-28) that the use of the word "deemed" in Section 416(h)(2)(B) and (h)(3)(C) demonstrates "that an applicant who is 'deemed' to be a child has different characteristics (*i.e.*, is not the biological offspring of married parents) than an applicant who 'is' a child (*i.e.*, is such an offspring)." Respondent advances a parallel theory (Br. 29-30) in addressing the

observation in the government's opening brief (at 15) that Section 416(h)(1)(A) directs the Commissioner to look to state law to determine whether an applicant is eligible for benefits as the wife, husband, widow, or widower of the insured, thus demonstrating that Section 416(h) is to be applied in all cases to determine whether the requisite "family status" is established as a legal matter.

Those arguments are flawed because the word "deemed" is used in this context simply to define a term, a usage that is common in the law. For example, in stating the definition of "supervisor" for purposes of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, this Court has observed that "employees are deemed to be 'supervisors' * * * if, *inter alia*, they exercise 'independent judgment' in 'responsibly . . . direct[ing]' other employees 'in the interest of the employer.'" *NLRB* v. *Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 708 (2001) (quoting 29 U.S.C. 152(11)) (brackets in original). The Court did not mean that only those employees who are not actually supervisors must exercise independent judgment in directing other employees in order to qualify as supervisors; it meant that the statute defines "supervisor" as an employee who exercises such judgment. Similarly, in *Shannon* v. *United States*, 512 U.S. 573 (1994), the Court observed that "a person is deemed insane if he is unable 'to appreciate the nature and quality or the wrongfulness of his acts.'" *Id.* at 582 (quoting 18 U.S.C. 17(a)). The Court did not mean that such a person is not actually insane, but rather that insanity is defined as the inability to appreciate the wrongfulness of one's acts. Congress used the word "deemed" in Section 416(h) in the same way.

C. Respondent's Arguments Based On Legislative History And Statutory Purpose Lack Merit

As explained in the government's opening brief (at 16-22), the court of appeals' interpretation of the Act rests on a misunderstanding of the legislative history and would undermine the statute's purposes. Respondent's attempts to defend those aspects of the court's reasoning are unsuccessful.

1. Respondent repeats the error of the court of appeals in relying on the 1965 amendments to the Act, which added Section 416(h)(3)(C) "to address the specific case of children born out of wedlock" (Br. 31), to argue that Sections 416(h)(2) and (h)(3) are addressed in their entirety *only* to such children. See Br. 18 (arguing "that Congress included Section 416(h)(2) in the Act to *expand* the statute's coverage beyond the biological children of married parents"); Pet. App. 8a. It is true that the 1965 amendments expanded eligibility, but they did not do so, as respondent would have it, by altering the role of Section 416(h) as the provision that governs the "[d]etermination of family status," including an applicant's status as a "child." Instead, Congress added alternative mechanisms to Section 416(h) under which a "son or daughter" who could not inherit under state intestacy law could nonetheless establish the requisite child- parent relationship as a legal matter for purposes of receiving survivor benefits. The amendments thus demonstrate that "Congress understood the Act's framework as requiring all natural children to pass through [Section] 416(h) to claim child status." *Schafer* v. *Astrue*, 641 F.3d 49, 58 (4th Cir. 2011), petition for cert. pending, No. 11-824 (filed Dec. 29, 2011).

Respondent quotes (Br. 32) a passage from the Senate Report stating that "whether a child gets benefits

should not depend on whether he can inherit his father's intestate personal property under the laws of the State in which his father happens to live." S. Rep. No. 404, 89th Cong., 1st Sess. Pt. 1, at 110 (1965) (Senate Report). In the very next sentence, however, the report explained that "[t]he committee has therefore included in the bill a provision under which benefits would be paid to a child" who could not inherit, "if the father had acknowledged the child in writing, had been ordered by a court to contribute to the child's support, had been judicially decreed to be the child's father, or is shown by other evidence satisfactory to the Secretary * * * to be the child's father and was living with or contributing to the support of the child." *Ibid.* In other words, the language respondent quotes was not a general statement about the irrelevance of state intestacy law, but merely a description of the new Section 416(h)(3)(C). In cases not governed by that provision (or by the subsequently enacted Section 416(h)(2)(B)), state law remains the mechanism for establishing status as a "child" under the Act.

2. Respondent attempts (Br. 35-36) to support her interpretation of the Act by invoking the canon that remedial statutes are to be broadly construed, but she cites no case in which this Court has applied such a canon in interpreting these precisely drawn provisions of the Social Security Act. Nor would it be appropriate to apply such a canon where, as here, any statutory ambiguity has been resolved by an administrative interpretation that is entitled to deference under *Chevron*. See pp. 21-22, *infra*. In a related argument, respondent asserts (Br. 34) that the purpose of the statute is to provide security to children. In fact, the Act's purpose is more specific. If it were not, there would be no eligibil-

ity limitations other than a demonstration of need—which notably is not a requirement of the Act as written. Rather, as explained in the government's opening brief (at 21-22), Congress intended Social Security survivor benefits to function as insurance, providing support for children after the unanticipated loss of support by a parent. Accomplishing that purpose does require extending benefits to children who were not conceived until after a wage earner's death and who would not inherit from the deceased under state law.

According to respondent (Br. 39), it is irrational to exclude posthumously conceived children from benefits while not also excluding children who were conceived when a parent was about to die. But the distinction is amply justified by considerations of sound administration. While the Act might be considered overinclusive insofar as it covers children who are conceived with the knowledge that a parent will die soon, Congress could easily decide that such overinclusivity is preferable to requiring SSA to investigate the circumstances of the death of every wage earner whose child seeks survivor benefits Compare *Weinberger* v. *Salfi*, 422 U.S. 749, 777-785 (1975).

Respondent cites (Br. 40) *Jimenez* v. *Weinberger*, 417 U.S. 628 (1974), for the proposition that the Act is not focused on providing benefits for children who experience an unanticipated loss of parental support. But *Jimenez* did not involve survivor benefits; it involved benefits for children based on a parent's disability. *Id.* at 630. Under the law in effect at the time, illegitimate children who lacked state-law intestacy rights were treated differently from other children in that they were entitled to benefits only if they could demonstrate that they were dependent on the parent before the onset of

the parent's disability. *Id.* at 631 n.2. Attempting to defend that restriction against an equal protection challenge, the government argued that the Act is intended to replace only support enjoyed before the onset of the parent's disability. This Court rejected that argument, pointing out that the Act did provide benefits to legitimate children born after the onset of the parent's disability. *Id.* at 634.

The holding in *Jimenez* has no relevance to the statutory scheme for survivor benefits. To the contrary, as explained in the government's opening brief (at 20-22), this Court subsequently recognized in *Mathews* v. *Lucas*, 427 U.S. 495 (1976), that Congress intended child survivor benefits "just 'to replace the support lost by a child when his father . . . dies,'" *id.* at 507 (quoting Senate Report 110), and that Congress chose to hinge eligibility on intestacy rights because "where state intestacy law provides that a child may take personal property from a [parent's] estate, it may reasonably be thought that the child will more likely be dependent during the parent's life and at his death," *id.* at 514.

3. This Court has "consistently recognized" that "[b]ecause domestic relations are preeminently matters of state law, * * * Congress, when it passes general legislation, rarely intends to displace state authority in this area." *Mansell* v. *Mansell*, 490 U.S. 581, 587 (1989). By imposing a uniform federal rule to govern the status of posthumously conceived children—a rule that goes well beyond what any State has adopted (Gov't Br. 20)—the court of appeals' interpretation of the statute undermines that important principle of federalism. Respondent points out (Br. 37) that because Social Security is a federal benefits program, Congress could adopt a federal rule without infringing any state prerogative.

That is true but irrelevant because there is no reason to believe that Congress wished to do so. While respondent suggests (Br. 38) that Congress sought to "suppl[y] a core definition of 'child' that is independent of state law," that claim is not supported by anything in the statute. To the contrary, Section 416(h)(2)(A) expressly recognizes the role of States in defining family relationships. And since, as even respondent agrees, Congress intended to incorporate state intestacy law with respect to at least some categories of applicants, it follows that Congress must have disagreed with respondent's view (Br. 34) that the application of state law results in benefits being "doled out unfairly because of strict state eligibility requirements."

D. SSA's Interpretation Of The Act Raises No Constitutional Concerns

Respondent contends (Br. 42) that SSA's interpretation of the Act raises constitutional concerns under the equal protection component of the Due Process Clause. Even those courts of appeals that have accepted respondent's interpretation of the Act have rejected the constitutional argument that she advances. See Pet. App. 4a n.1; *Vernoff* v. *Astrue*, 568 F.3d 1102, 1112 (9th Cir. 2009). This case presents no serious constitutional question.

1. According to respondent (Br. 42-43), SSA's interpretation of the statute treats "posthumously conceived children * * * as an inferior subset of natural children who are ineligible for government benefits simply because of their date of birth and method of conception." But neither Congress nor SSA has classified children on the basis of whether they were posthumously conceived. Instead, the agency adjudicates benefits claims on be-

half of such children under the same criteria it uses in all other cases, and it awards benefits to any child who qualifies as a deceased wage earner's dependent "child" under the Act—*i.e.*, any dependent child who can inherit from the wage earner under applicable state intestacy law. See *Vernoff*, 568 F.3d at 1112 ("SSA is not excluding all posthumously-conceived children [from receiving benefits], only those that do not meet the statutory requirements under State law."). In some States, some posthumously conceived children may qualify. See, *e.g.*, Unif. Probate Code § 2-120(k) (amended 2008), 8 U.L.A. 58 (Supp. 2011) (treating a posthumously conceived child as "in gestation at the individual's death," if certain time limits are met).

2. Even if the Act did treat posthumously conceived children differently than children conceived before a parent's death, that distinction would be subject only to rational-basis review because it is not based on a suspect classification and does not impinge on any fundamental right. See *FCC* v. *Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). Under that highly deferential test, a court may not "judge the wisdom, fairness, or logic of legislative choices." *Ibid.* Instead, a challenged statute "bear[s] a strong presumption of validity," *id.* at 314, a presumption that is especially strong in the context of legislation "conferring monetary benefits" because "Congress should have discretion in deciding how to expend necessarily limited resources," *Schweiker* v. *Wilson*, 450 U.S. 221, 238 (1981).

A distinction between posthumously conceived children and other children would easily satisfy rational basis review because it would reflect "real and undeniable differences" between the two groups. *City of Cleburne* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432, 444

(1985). Specifically, such differential treatment would reflect the reality that, when a child is conceived after the death of one parent, that parent cannot have provided actual support to the child. Because a central purpose of child survivor benefits is to replace the support that the child lost as a result of a parent's death, posthumous conception is a rational basis for denying benefits. See *Lucas*, 427 U.S. at 507.

3. Attempting to analogize classifications on the basis of posthumous conception to classifications on the basis of illegitimacy, respondent argues (Br. 43-44) that the Court should apply intermediate scrutiny. The analogy is inapt. Statutes that classify based on illegitimacy are subject to heightened scrutiny because "[t]he status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage," and "visiting this condemnation on the head of an infant is illogical and unjust." *Weber* v. *Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972). A classification based on posthumous conception would have nothing to do with societal disapproval—while respondent asserts (Br. 43) that posthumously conceived children have suffered "a history of discrimination," she offers no evidence to support that claim, and it ignores the fact that posthumous conception was not even possible until recently and could not have been imagined by Congress in 1939.

In any event, even if this Court were to apply some heightened degree of scrutiny, the Act's eligibility requirements would still be constitutional (as are the numerous state laws that deny intestacy rights to posthumously conceived children). In addition to protecting the Social Security trust fund, the eligibility requirements are substantially related to the important govern-

mental objective of limiting benefits to those children who lost a parent's support. The statute's specification of objective eligibility criteria minimizes the administrative burden of proving entitlement to benefits on a case-by-case basis for the classes of children most likely to have been actually dependent on the deceased parent. See *Lucas*, 427 U.S. at 509 (observing that "Congress' purpose in adopting the statutory presumptions of dependency was obviously to serve administrative convenience" and concluding that those presumptions are constitutionally permissible); *Vernoff*, 568 F.3d at 1112 (rejecting equal protection challenge to denial of benefits for posthumously conceived child because, "[a]s in *Lucas*, the challenged classifications are reasonably related to the government's twin interests in limiting benefits to those children who have lost a parent's support and in using reasonable presumptions to minimize the administrative burden of proving dependency on a case-by-case basis").

E. SSA's Interpretation Of The Act Is Entitled To Deference

Even if the Act were susceptible to the interpretation adopted by the court of appeals, the court erred in disregarding SSA's contrary interpretation, which has been in place for more than 70 years. See Gov't Br. 22-25. Respondent does not dispute that SSA has long had published regulations answering the question of statutory interpretation here, or that *Chevron* governs this Court's review of the interpretation set out in those regulations. Instead, she argues (Br. 45) that the statute is unambiguous at step one of *Chevron*, and (Br. 45-46) that the agency's interpretation is unreasonable at step two of *Chevron*. Her arguments on both points, how-

ever, are entirely derivative of her flawed arguments based on the statutory text and purpose. Since the statutory text is, at a minimum, ambiguous, the agency's interpretation should be upheld.

Because SSA's regulations are sufficient by themselves to resolve the question presented, there is no need to consider the statement in the agency's Program Operations Manual System (POMS) that even more specifically addresses that question. If, however, the Court concludes that the regulations are ambiguous, then the POMS provision is entitled to deference under *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997), as an interpretation of the regulations. In any event, respondent appears to concede (Br. 47) that the interpretation in the POMS is at least entitled to deference under *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 139-140 (1944), as an interpretation of the statute.

* * * * *

For the foregoing reasons and those stated in the opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

FEBRUARY 2012

AMICUS CURIAE BRIEF

No. 11-159

IN THE

Supreme Court of the United States

MICHAEL J. ASTRUE,
COMMISSIONER OF SOCIAL SECURITY,

Petitioner,

v.

KAREN K. CAPATO, ON BEHALF OF B. N. C., ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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INTEREST OF THE *AMICUS CURIAE*[1]

The Cancer Legal Resource Center is a program of the Disability Rights Legal Center ("DRLC"), a non-profit organization dedicated to championing the rights of people with disabilities and to heightening public awareness of those rights by providing legal and related services through education, advocacy, and litigation. DRLC accomplishes its mission through many programs, including the Cancer Legal Resource Center ("CLRC," a joint program with Loyola Law School Los Angeles), the Education Advocacy Program, the Education and Outreach Program, and the Civil Rights Litigation Program. Since 1975, DRLC has handled countless disability rights cases under state and federal civil rights laws challenging discriminatory practices by government, business, and educational institutions.

Through the CLRC, the DRLC addresses specific interests in cancer-related legal issues. The CLRC provides free information and resources to cancer patients, survivors, caregivers, health care professionals, employers, and others coping with cancer nationwide on cancer-related legal issues, such as access to government benefits and health care, employment and taking time off work, insurance coverage, and estate planning.

From the CLRC's direct work with cancer patients and their families, the CLRC understands that access to government benefits is an area of primary concern.

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* and its counsel, make a monetary contribution to the preparation or submission of this brief. All of the parties have consented to this filing in letters that have been filed with the Clerk of the Court.

The onset of cancer is most often unexpected, especially among young adults. Accordingly, the CLRC works with cancer patients to ensure that they understand what government benefits are available in their individual situations, and how to access them. It is important to clarify and guarantee the equal rights of cancer patients, including with regard to child survivor benefits under the Social Security Act. Adults of child-rearing age with cancer enjoy the same rights as other wage earners, including the choice to have children and to receive Social Security Administration benefits. The CLRC therefore supports granting child survivor benefits under the Social Security Act to posthumously conceived children of deceased wage earners.

SUMMARY OF ARGUMENT

At the outset, it is crucial to understand the context in which posthumous conception occurs. Cancer affects significant numbers of Americans. There are nearly 12 million cancer survivors in the United States, and 1.6 million people are expected to be diagnosed with cancer in 2012. Although medical treatments are increasingly successful, those treatments are often accompanied by harmful effects on patients' fertility. Fertility preservation allows patients to choose to reproduce after their treatments conclude. Many of these patients elect to have children regardless of their prognosis.

The central issue in this case is the definition of "child" in the Social Security Act. The Act provides benefits for children of deceased insured individuals regardless whether their parents conceived them through natural or artificial means, or before or after one of the parents' deaths. The statute reads: "[t]he term 'child' means * * * the child * * * of an

individual * * * ." 42 U.S.C. § 416(e). The Commissioner's alternative construction, that the meaning of "child" must be determined by reference to state intestacy law, raises serious Constitutional concerns. Under the Commissioner's interpretation, a child's ability to receive Social Security benefits would be determined by when and how that child's parents chose to conceive the child. A child conceived naturally or artificially prior to a parent's death would be entitled to benefits, whereas a child conceived following a parent's death might not. This irrational distinction also presents the risk of impairing parents' fundamental right to have children. The Court should apply the Constitutional avoidance doctrine and decline to adopt the Commissioner's Constitutionally problematic interpretation.

Furthermore, the Commissioner's policy concerns are misplaced. The Commissioner's brief asserts that benefits are available only to children who relied on the decedent's wages for support. But that argument is outside the scope of the question presented to the Court. The issue of whether an applicant is the "child" of the decedent is separate from the additional statutory test of whether the applicant was dependent upon the decedent. *See* 42 U.S.C. § 402(d)(1). The latter question was not decided below.

Likewise, the Commissioner inaccurately asserts that the Act was intended to provide benefits for children who unexpectedly lose a parent. To the contrary, nothing in the Act bars benefits where the parent's death was anticipated, and there is no reason why the word "child" in the statute would imply such a rule.

The Commissioner also erroneously suggests that the Third Circuit's holding raises federalism

concerns. To the contrary, the Act defines "child" only for purposes of providing Social Security survivors' benefits, and does not affect states' abilities to define "child" differently for different purposes. To the extent that state law is used to determine the meaning of the word "child" in the administration of a federal benefits program, the Court must reject state laws that "use the word 'child[]' in a way entirely strange to those familiar with its ordinary usage * * * ." *De Sylva v. Ballentine*, 351 U.S. 570, 581 (1956).

Finally, the Commissioner cites extrinsic authorities in a misguided attempt to avoid Congress's clear command that "[t]he term 'child' means * * * the child * * * of an individual * * * ." 42 U.S.C. § 416(e). A plain reading of Section 416(e) does not render Sections 416(h)(2)(B) and (3)(C) redundant, because those sections still affect whether an applicant is deemed dependent on the insured for purposes of Section 402(d)(3). In interpreting those statutes, the Court should not place significant weight on legislative history from the time period after the operative language was enacted, nor should the Court defer to administrative interpretations of an unambiguous statute such as this one.

ARGUMENT

I. CANCER AND OTHER COMMON CONDITIONS CAUSE PATIENTS TO SEEK FERTILITY PRESERVATION TO PRESERVE THEIR REPRODUCTIVE CHOICES

A. Cancer Treatments and Other Causes of Infertility are Widespread and Unpredictable

Over forty percent of Americans born today will be diagnosed with cancer at some point in their lives. Linda A. Jacobs, *et al.*, *Adult Cancer Survivorship: Evolution, Research, and Planning Care*, CA: A Cancer Journal for Clinicians, Nov.-Dec. 2009, at 391, 392, *available at* http://caonline.amcancersoc.org/cgi/content/full/59/6/391. Radiation and chemotherapy have nearly doubled the five-year survival rate of cancer patients over the last fifty years. Gregory Dolin, *et al.*, *Medical Hope, Legal Pitfalls: Potential Legal Issues in the Emerging Field of Oncofertility*, 49 Santa Clara L. Rev. 673, 673 (2009) (reporting that the five-year survival rate rose from thirty-five percent in 1950–1954 to sixty-seven percent in 1996–2004). Regrettably, those life-saving treatments can have a devastating effect on the reproductive capacity of cancer survivors. Teresa K. Woodruff, *The Emergence of a New Interdiscipline: Oncofertility* 3, *in Oncofertility* (T.K. Woodruff & K.A. Snyder eds., 2007), *available at* http://oncofertility.northwestern.edu/sites/default/files/uploadedfilecontent/onco_chapter_1.pdf.

Radiation and chemotherapy can lead to "immediate infertility in some cases" and a lowered probability of conception in others. Dolin, *supra*, at

683. Some treatment methods result in infertility rates of up to 69% percent in females. Laxmi A. Kondapalli, *Oncofertility: A New Medical Discipline and the Emerging Scholar* 9, *in Oncofertility*, *supra*, *available at* http://oncofertility.northwestern.edu/sites/default/files/uploadedfilecontent/onco_chapter_16.pdf. As a result of the risks and new advances in assisted reproduction technology, medical professionals are encouraged to discuss fertility preservation with cancer patients before beginning treatment. *See generally id.*

Cancer patients are not alone in choosing life-saving treatments at the expense of their own ability to bring life into the world. Treatment for other medical issues, including autoimmune diseases, involves risks to fertility, and patients may engage in fertility preservation to effectuate their reproductive choices. Susan L. Barrett & Teresa K. Woodruff, *Gamete Preservation* 5, *in Oncofertility* (T.K. Woodruff, *et al.* eds., 2010), *available at* http://oncofertility.northwestern.edu/sites/default/files/uploadedfilecontent/chapter_3_word.pdf. In addition, there have been reports since 1991 of military personnel depositing sperm before deploying to war zones, and astronauts in the 1960s deposited their sperm in the event radiation in space adversely affected their fertility. *See* Kristine S. Knaplund, *Postmortem Conception and a Father's Last Will*, 46 Ariz. L. Rev. 91, 91-92 (2004). While some fertility preservation options have advanced in recent years, planning to reproduce in the face of dire circumstances is nothing new. *See* Shauna L. Gardino & Linda L. Emanuel, *Choosing Life When Facing Death: Understanding Fertility Preservation Decision-Making for Cancer Patients*, *in Oncofertility* 447, 448 (T. K. Woodruff, *et al.* eds., 2010), *available*

at http://oncofertility.northwestern.edu/sites/default/files/uploadedfilecontent/chapter_34_word.pdf (describing fertility preservation as "a modern twist on the old practice of siring before leaving for war" and discussing the wartime baby boom of the early 1940s).

B. Fertility Preservation is a Legitimate Means to Effectuate Reproductive Choices

Cancer patients have several options for preserving their fertility. Men can cryopreserve (freeze) semen, while women can undergo ovarian stimulation for maturation and retrieval of eggs, which can either be frozen immediately or fertilized to produce embryos, which are then frozen. *See* Dolin, *supra*, at 683-85; *see generally* Jacqueline S. Jeruss, *et al.*, *Preservation of Fertility in Patients with Cancer*, 360 N. Eng. J. Med. 902 (2009); Barrett & Woodruff, *supra*. Preserved sperm can be used for intrauterine insemination, as well as to fertilize preserved eggs to create embryos, which can be implanted in the female and carried to term. The embryos may be created before or after the death of the parent.

Fertility preservation and assisted reproduction can be costly, but these tools are becoming increasingly accessible to patients. Disability rights organizations such as the Cancer Legal Resource Center are actively advocating for insurance coverage of fertility preservation in connection with treatment for cancer, to enable all patients to retain their ability to exercise their right to procreate following treatment. *See generally* Daniel Basco, *et al.*, *Insuring Against Infertility*, J. L., Med. & Ethics, Winter 2010, at 832, *available at* http://oncofertility.northwestern.edu/sites/default/files/uploadedfileconte

nt/basco_et_al._2010.pdf.

C. Posthumous Conception as an Effectuation of Pre-mortem Choices

Although cancer patients generally preserve their fertility in the hopes that they will survive and be able to live a "healthy" life, *see* Dolin, *supra*, at 674, some decide to have genetic children regardless whether they survive. *Cf.* Mark D. Hornstein, *Disposition of Banked Sperm and Embryos*, Fertility Weekly, Oct. 6, 2003, at 4 (providing statistics on male patients' choosing to release their genetic material to a survivor upon their death).

Despite a pre-mortem decision to reproduce and the initiation of the process of reproduction, the physical act of conception can occur before or after the parent's death. There are several common situations in which the moment of conception may occur after a parent's death, even though the process was initiated while both parents were living. First, consider a couple who intend to have a child, initiate in vitro fertilization, and successfully fertilize one or more embryos, but the fertilized embryos have not been implanted by the time of the father's death. Consistent with the couple's earlier decision to have a biological child through IVF, the wife undergoes embryo transfer and conceives. Such a child would be conceived after death, but is clearly the product of a pre-mortem reproductive choice.

Second, consider a family which has decided to conceive a child, but deliberately waited until the success or failure of cancer treatment to consummate assisted reproduction. Terminal illness can place an enormous amount of strain on a family's time, emotions, and finances. The couple has spent most of their money on life-prolonging treatments. The wife

prefers to spend her husband's last days by his side rather than in a fertility clinic, and does not feel emotionally situated to have a healthy pregnancy. *Cf.* Michal Braun & Lea Baider, *Souvenir Children: Death and Rebirth*, 25 J. Clinical Oncology 5525, 5526 (2007) (suggesting that surviving spouses wait a year to grieve before pursuing conception). After waiting a year, she has the embryos implanted, and conceives. Again, the physical act of conception occurred after the death of a parent, but there was an unbroken chain linking the child's birth to a pre-mortem decision to reproduce.

Much of the criticism of assisted reproduction has focused on the hypothetical situation in which a surviving spouse uses the decedent's genetic material without consent. *See, e.g.*, Bob Simpson, *Making "Bad" Deaths "Good": The Kinship Consequences of Posthumous Conception*, 7 J. Royal Anthrop. Inst. 1 (2001). Indeed, some states have imposed "heightened consent requirements," to ensure that certain rights "go *only* to those whom the deceased parent intended to support as a child." *Schafer v. Astrue*, 641 F.3d 49, 59 (4th Cir. 2011) (emphasis added). Even if surviving spouses could use a decedent's genetic material without consent, *cf. Davis v. Davis*, 842 S.W.2d 588, 602 (Tenn. 1992) (holding that the providers of genetic material have control over its disposition at death); *Hecht v. Superior Court*, 16 Cal. App. 4th 836, 850 (1993) (same), the legal significance of the lack of consent would affect only whether such a child was "dependent" on the wage-earner under the Act (which is not presently before the Court), not whether the child was a "child" under the Act. *See infra* at 16-18.

More important, such a scenario is not at issue in this case. In each of the four U.S. Court of Appeals

cases dealing with survivors' benefits for posthumously conceived children, the decedent expressed his intent that the surviving spouse use his genetic material to conceive a child. *See Beeler v. Astrue*, 651 F.3d 954, 956 (8th Cir. 2011) (couple had not attempted to conceive, but husband signed statement that he desired his wife to use his frozen sperm to conceive a child); *Schafer*, 641 F.3d at 51 (although no consent in writing, evidence existed that the decedent intended for his wife "to use the stored semen to conceive a child after his anticipated death"); *Capato v. Comm'r*, 631 F.3d 626, 627 (3d Cir. 2011) (although the couple was able to conceive a son naturally after the decedent's semen was stored, evidence existed that decedent wished that son to have a sibling); *Gillett-Netting v. Barnhart*, 371 F.3d 593, 594-95 (9th Cir. 2004) (wife miscarried twice during conventional conception attempts; and prior to death, husband "confirmed that he wanted [his wife] to have their child after his death using his frozen sperm").

II. THE COMMISSIONER'S CONSTRUCTION RAISES SERIOUS CONSTITUTIONAL CONCERNS, WHICH MAY BE AVOIDED BY ADOPTING THE THIRD CIRCUIT'S CORRECT CONSTRUCTION

The Commissioner's attempt to deny benefits to posthumously conceived children raises serious Constitutional concerns with respect to children's rights to be free from discrimination based on their parents' status and parents' decisions to have children. The Court should reject the Commissioner's interpretation because when "'a construction of the statute is fairly possible by which a serious doubt of constitutionality may be avoided,' a court should adopt that construction." *Califano v. Yamasaki*, 442

U.S. 682, 693 (1979) (internal brackets omitted) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)); *see also United States v. Clark*, 445 U.S. 23, 33-34 (1980) (broadly construing the Civil Service Retirement Act's requirement that a beneficiary child "lived with" a covered federal employee where such "construction [was] necessary to avoid a serious constitutional question"). The Third Circuit's correct construction avoids those Constitutional concerns.

A. The Statute Is Clear That "Child" Means "Child"

The language of the statute is clear. Section 402(d)(1) provides that a "child (as defined in Section 416(e) of this title)" is entitled to benefits if the child meets other specified criteria. The cross-referenced section, Section 416(e), provides that "[t]he term 'child' means * * * the child * * * of an individual * * *." 42 U.S.C. § 416(e). The Third Circuit's decision is correct, and the Court should reject the Commissioner's arguments that Section 416(h)(2)(A) affects the outcome of this case, as that subsection is not cited in either Section 402(d)(1) or Section 416(e).

B. Posthumously Born Children Have a Right To Be Free From Discrimination Based on the Circumstances of Their Conception

The Commissioner's interpretation of the Act would have the effect of denying benefits to children on the grounds that they were not conceived through what some would call "traditional means." By allowing states to deem posthumously conceived children categorically ineligible for Social Security survivors' benefits, the Commissioner's interpretation echoes the same type of social stigmas that have been rightly

rejected with respect to legitimacy.

As choices to pursue fertility preservation options inevitably become more common, discrimination against posthumously conceived children will one day seem as antiquated as the attempts by states to discriminate against "illegitimate" children. As the Court explained in *Gomez v. Perez*:

> [A] State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally. We therefore hold that once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother. For a State to do so is "illogical and unjust."

409 U.S. 535, 538 (1973) (citation omitted).

This analysis applies with equal force to posthumously conceived children. By preventing posthumously conceived children from obtaining Social Security survivors' benefits, the Commissioner's interpretation would give rise to a number of "illogical and unjust" distinctions between similarly-situated children. For example, the Commissioner would not dispute that benefits are available for a child conceived (through either natural or artificial means) by a terminally ill father shortly before the father's death. Yet, under the Commissioner' theory, benefits could potentially be denied if the child were conceived on the day after the father's death. It is undisputed that, in each

hypothetical case, the child is indeed the "child" of the deceased father. Further, in each case the death was not unanticipated. To distinguish between the two creates an unacceptable risk of irrational discrimination between two children conceived in virtually identical circumstances.

The Commissioner is unable to present adequate justification of his choice not to consider posthumously conceived children to be "children" of their parents just like any other children. Historically, the distinction between "legitimate" and "illegitimate" children was supposed to rest on "lurking problems with respect to proof of paternity." *Id.* But, to the extent it ever was the real reason for discriminating against "illegitimate" children, similar problems are not present here: there is no doubt that the applicants are the genetic offspring of their father. Just as children of IVF are considered "children" though they were conceived through once-unfamiliar technology, so too are children who are conceived through the use of fertility preservation technology. To the extent that the Commissioner would justify discrimination against the applicants on account of concerns that the decedent's death was foreseeable, or that principles of federalism require blind application of state law, those arguments are rejected *infra* at 19-22.

Moreover, such discrimination affects more than the posthumous child him- or herself. Because the "primary objective" of Social Security survivors' benefits is "to provide workers *and their families* with basic protection against hardships created by the loss of earnings * * * ," *Mathews v. De Castro*, 429 U.S. 181, 185-86 (1976) (emphasis added), the improper denial of benefits to a posthumously conceived child has a direct and harmful effect on the other members

of that child's entire family. In effect, the Commissioner's interpretation raises Constitutional concerns about discrimination against children (who have no control over the timing and method of their conception and birth), their siblings, and their surviving parents (who did nothing more objectionable than exercise their fundamental right to procreate, *see infra* at 14-15). This interpretation should be rejected in favor of the Third Circuit's alternative construction, which presents none of the difficult problems of Constitutional law posed by the Commissioner's approach.

C. Parents Have A Fundamental Right To Decide Whether To Have Children

The Commissioner's proposed construction also implicates the Constitutionally protected rights of individuals to control their reproductive choices. Consenting adults have a fundamental right to decide whether to have children. *See, e.g.*, *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."); *Skinner v. State of Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) ("We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race."); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (holding that the "liberty" protected by the Fourteenth Amendment includes "the right of the individual * * * to marry, establish a home and bring up children * * *."). When a cancer patient decides to preserve his or her genetic material for future use in reproduction, the

patient has exercised his or her Constitutionally protected right to "deci[de] whether to bear or beget a child." *Eisenstadt*, 405 U.S. at 453.

The Commissioner's interpretation of "child" would have the effect of interfering with the timing and mechanics of a parent's decision to have children. Other cases addressing the legal ramifications of artificial reproductive technologies recognize that parental rights (and concomitant responsibilities) attach at the moment at which the parents decide to procreate, rather than at the moment of childbirth or even pregnancy. *See, e.g.*, *In re Marriage of Buzzanca*, 61 Cal. App. 4th 1410, 1418-19 (1998) (collecting cases for the proposition that courts have "universally * * * assigned parental responsibility to the husband based on conduct evidencing his consent to [his wife's] artificial insemination" (internal quotation marks omitted)).

Moreover, the Commissioner's interpretation may encourage prospective parents with serious illnesses to delay or even forego life-prolonging treatment in order to ensure that federal benefits are available to their progeny. Consider a couple, in the midst of dealing with the physical, emotional, and financial burdens associated with cancer diagnosis and treatment, having to decide whether to prioritize procreation or life-prolonging treatment. Under the Commissioner's interpretation, even when the couple has already decided to have a child and begun the physical process of doing so, electing to delay conception until after radiation and chemotherapy may come at the expense of their child's benefits under the Act.

To steer clear of the difficult Constitutional questions presented by this scenario, the Third Circuit's correct construction of the statute should be

adopted.

III. THE COMMISSIONER'S DEPENDENCY CONCERNS ARE MISPLACED

The Commissioner places undue emphasis on whether a child conceived through the use of fertility preservation methods is dependent upon the decedent. By doing so, the Commissioner wages a battle other than the one before this Court: the statutory test whether a potential beneficiary is a "child" of the wage earner is an entirely separate inquiry than as to whether the potential beneficiary "was dependent upon" the wage earner, 42 U.S.C. § 402(d)(1)(C). The case has focused entirely on the definition of "child," and the question before the Court is limited to the definition of "child." A record has not been established as to dependency—and in fact the lower court remanded to create such a record—but the Commissioner nevertheless attempts to subsume the dependency standard into the definition of a "child."

Throughout his brief, the Commissioner invokes a desire to protect a supposed "core beneficiary class: the children of deceased wage earners *who relied on those earners* for support," and expresses a fear that the Third Circuit's decision "serve[s] a purpose more akin to subsidizing the continuance of reproductive plans." Pet. Br. 22 (quoting *Schafer*, 641 F.3d at 58-59) (emphasis added). In effect, the Commissioner suggests that only a dependent can be a child. But, those arguments have no relation to whether an applicant is a "child" under the Social Security Act. Rather, they bear solely on the dependency prong of the eligibility test that is not currently at issue.

The Social Security Act provides child survivors' benefits to "[e]very child * * * of an individual who

dies a fully or currently insured individual," provided that the child (a) files an application, (b) is unmarried and meets the age requirements, and (c) "was dependent upon such individual * * * at the time of such death." 42 U.S.C. § 402(d)(1). At issue in this case is whether the posthumously conceived twins of Robert Capato are his "child[ren]" for the purposes of the Act. Should the Court agree that the children are, in fact, "children," the case must still be remanded to determine whether the children meet the dependency requirement in 42 U.S.C. § 402(d)(1)(C), which no court has yet decided. The dependency battle is not yet at hand, and the Commissioner cannot be permitted to fight it through the guise of the meaning of "child."

The requirements of child status and dependency are separate under the Act and may not be conflated. *Compare* 42 U.S.C.§ 402(d)(1) (setting forth the "child" status requirement), *with id.* § 402(d)(1)(C) (setting forth the dependency requirements). Reading a requirement of "rel[ying] on th[e] earner for support" into the definition of "child" would render the dependency requirement superfluous, a result that should be avoided based on common sense as well as traditional canons of construction. *See Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991) ("[The Court] construe[s] statutes, where possible, so as to avoid rendering superfluous any parts thereof." (citing *United States v. Menasche*, 348 U.S. 528, 538-39 (1955))).

The Commissioner further attempts to conflate "dependency" with the definition of "child" by arguing that:

> [A]lthough this case involves a deceased father who was married to the children's mother, the logic of the court

> of appeals' decision would be equally applicable to children conceived by means of sperm from an anonymous donor who was insured under the Act, who happened to die before conception, but who was later identified.

Pet. Br. 22. This (mercifully short) parade of horribles, too, is stopped in its tracks by the dependency requirement. *Cf. Gillett-Netting*, 371 F.3d at 598 (even under a broad reading of the Act, "completely unacknowledged, illegitimate children must prove actual dependency in order to be entitled to child's insurance benefits.") While not at issue in this case, there can be no doubt that a court would closely consider whether a child could be "dependent on" an anonymous donor. There is simply no reason to torture the definition of "child" so as to declare a biological child to not be a "child" in order to avoid a hypothetical scenario that Congress already addressed through a separate test for dependency.

The Commissioner's arguments regarding support and a "core class of beneficiaries" are red herrings. The Act already has a provision in place for narrowing its class of beneficiaries—the dependency requirement—and arguments about whether posthumously conceived applicants "relied on the deceased wage earner for support" should be directed to that requirement and addressed where they belong: on remand.

IV. THE SOCIAL SECURITY ACT DOES NOT REQUIRE THE "UNANTICIPATED DEATH" OF THE WAGE EARNER

The Commissioner, quoting the Fourth Circuit, ascribes to the Act a "basic aim of primarily helping

those children who lost support after the *unanticipated death* of a parent." Pet. Br. 21 (quoting *Schafer*, 641 F.3d at 58) (emphasis added). He then argues that posthumously conceived children fall outside the core class of beneficiaries of the Act because they are "brought into being by a surviving parent with the knowledge that the deceased biological parent will not be able to contribute wages for the child's support." *Id.* at 22. *Schafer* does not provide support for the proposition that the Act finds children whose parents' deaths are unanticipated somehow "worthier" than children whose parents' deaths were foreseeable, nor could it. Nothing in the text or legislative history of the Act suggests a preference on behalf of Congress for survivors of "unanticipated" deaths, let alone that survivors of anticipated deaths are not the "child" of the decedent. *See supra* at 16-18.

To be clear, death is not always foreseeable in cases of posthumous conception. Assisted reproduction often involves multiple steps, and may require multiple attempts. At the time the parents commit to pursuing procreation through assisted reproduction, the parents may not anticipate the insured's death. At the point death becomes likely, eggs may have been stimulated, sperm may have been preserved, embryos may have been fertilized, and the couple may even have already made several failed attempts at implantation. Much time, money, emotional investment, and effort may have already been sacrificed. Yet the Commissioner would treat a child differently if the successful embryo was implanted in the final moments before the insured's death rather than the first moments thereafter. The proper turning point is the decision to reproduce and the start of the process, not the moment of birth, not the

moment of last chance to terminate pregnancy, and certainly not the moment of conception (whether such moment takes place in a test tube or in a human body).

Moreover, there is no "unanticipated death" standard for conventional reproduction, and any construction of the Act favoring lack of anticipation has been rejected. *See* Resp. Br. 40. An insured could spend his final moments conceiving by conventional means, fully anticipating that he would die before the child's birth, and the Commissioner would consider the resulting child a "child" just as any other insured's child. But, under the Commissioner's view, a child conceived moments after the insured's death (whether anticipated or not) may not be a "child."

The dichotomy of anticipated and "unanticipated" deaths is yet another attempt to read a dependency requirement into the definition of "child," and should fail for the reasons expressed *supra*, at 16-18. The Act treats equally children who are conceived while a wage earner was actively earning wages, retired, disabled, or even knowingly on death's doorstep. At best, the Commissioner's emphasis on lack of anticipation is misleading; at worst, it is entirely inconsistent with the statutory language.

The Court should decline the Commissioner's invitation to read a preference for unanticipated deaths into the purposes of the Act. That requirement was never intended by Congress.

V. THE COMMISSIONER'S FEDERALISM CONCERNS ARE NOT RELEVANT

The statute's command that "'child' means * * * the child * * * of an individual * * *," 42 U.S.C. § 416(e),

in no way impinges on principles of federalism. Contrary to the Commissioner's arguments, the administration of a federal benefits program in a manner consistent with Congress's command will not impermissibly intrude on state prerogatives or otherwise "create a federal common law of parental relationships in the context of posthumously conceived children." Pet. Br. 21. Congress has already made the relevant policy determinations, and has decided as a matter of federal statute that "child" means "child" for the purposes of the Act; the states remain free to implement their own benefits programs as they see fit.

Although the Commissioner observes that the Third Circuit's decision "adopted a rule that is broader than that adopted by any State" that has addressed posthumous conception, Pet Br. 20, nothing in Section 416(e) requires that the definition of "child" be consistent with, or narrower than, state law. In fact, Section 416(e) is *intentionally broader* than state law, as it includes, for example, children for whom adoption proceedings were instituted but not completed, and children who would be the stepchildren of insureds but for marriage ceremonies suffering particular "legal impediment[s] * * * ." 42 U.S.C. § 416(e). The Commissioner's attempt to require exact symmetry between Section 416(e) and state law cannot be squared with the statute's several provisions in which state law is plainly inapplicable.

By giving effect to the statute's distinct federal definition of "child," the Court will not interfere with subject matter that is traditionally administered by the states. The Court's decisions recognize that even in traditional areas of family law, federal law can prevail over state law. *E.g.*, *Mansell v. Mansell*, 490 U.S. 581, 588-89 (1989) (holding that statutes

governing federal veteran benefits preempted state community property law). Because Section 416(e)'s definition of "child" is limited to "this subchapter"—*i.e.*, the portion of the Social Security Act dealing with old-age, survivors, and disability insurance benefits, *see* 42 U.S.C. §§ 401-434—the Third Circuit's interpretation will not affect states' administration of their own intestacy laws and benefits programs. Nothing requires states (or, for that matter, federal courts addressing other statutes) to adopt this definition of "child" for any purpose other than the Social Security Act's survivors' benefits provision.

Finally, this Court must adhere to its rule in *De Sylva v. Ballentine* that states may not "use the word 'child[]' in a way entirely strange to those familiar with its ordinary usage * * * ." 351 U.S. 570, 581 (1956). The Capatos' twin children are undeniably the children of Robert and Karen Capato, he being their undisputed biological father, and she being their undisputed biological mother. Under *De Sylva*, the Court must deem them to be Robert Capato's "child[ren]" under Section 416(e), regardless whether state intestacy laws recognize this common-sense conclusion for entirely separate state purposes.

VI. THE STATUTORY LANGUAGE SUPPORTS THE THIRD CIRCUIT'S DECISION, AND THE COURT SHOULD REJECT THE COMMISSIONER'S ATTEMPTS TO CIRCUMVENT THE CLEAR LANGUAGE OF THE STATUTE

The language of the statute is unambiguous: under Section 402(d)(1), a child (as defined in Section 416(e)) is entitled to benefits, and under Section 416(e), "[t]he term 'child' means * * * the child * * * of

an individual * * * ." 42 U.S.C. § 416(e). It is undisputed that each of the applicants here is the biological "child" of Robert Capato.

The Commissioner invokes a number of extrinsic authorities in an attempt to avoid this straightforward application of Congress's clear language. The Court should reject each of these arguments.

First, the Commissioner argues that the Third Circuit's interpretation of Section 416(e) renders Sections 416(h)(2)(B) and (3)(C) superfluous, as the latter two subsections presuppose that the applicant is the biological child of the insured individual. Pet. Br. 14. But as Respondent explains, Sections 416(h)(2)(B) and (3)(C) contribute to the determination whether the applicant is "deemed dependent" on the insured under Section 402(d)(3). Resp. Br. 28-29; *see also Norton v. Mathews*, 427 U.S. 524, 526 n.1 (1976). Specifically, whereas Section 402(d)(3)(A) deems all "legitimate" biological children to be dependent on the insured (save two exceptions not relevant here), Section 402(d)(3) permits "illegitimate" biological children to be deemed dependent on the insured only in the limited circumstances set out in Sections 416(h)(2)(B) and (3)(C). Thus, the Third Circuit's reading of Section 416(e) does not cause those sections to be duplicative.[2]

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[2] Moreover, even if the Court were to view Sections 416(h)(2)(B) and (3)(C) as duplicative of Section 416(e), the Court should recall that Sections 416(h)(2)(B) and (3)(C) were added to the statute decades after the enactment of 416(e)'s predecessor (which contained language that was materially identical to the language in the current version of the statute). Social Security Amendments of 1960, Pub. L. No. 86-778, § 208(b), 74 Stat. 924, 951, *codified at* 42 U.S.C. § 416(h)(2)(B); Social Security

Second, the Commissioner relies on a Senate Committee Report from 1965 as evidence that a child's eligibility for benefits is determined by state intestacy law. Pet. Br. 17-18 (citing S. Rep. No. 404, 89th Cong., 1st Sess. Pt. 1, at 109 (1965)). But because the relevant statutory language was enacted in 1939 rather than 1965, this legislative history does not control the meaning of Section 416(e). *See* Social Security Act Amendments of 1939, Pub. L. No. 76-379, § 201, sec. 202(c)(1), 53 Stat. 1360, 1364 ("Every child (as defined in section 209(k)) of an individual entitled to primary insurance benefits, or of an individual who died a fully or currently insured individual * * * shall be entitled to receive a child's insurance benefit * * * ."); *id.* at § 201, sec. 209(k), 53 Stat. at 1377 ("[t]he term 'child' * * * means the child of an individual"). The 1965 Senate Report "form[s] a hazardous basis for inferring the intent" of the 1939 Act's drafters. *United States v. Price*, 361 U.S. 304, 313 (1960); *see also United States v. X-Citement Video, Inc.*, 513 U.S. 64, 77 n.6 (1994) ("[T]he views of one Congress as to the meaning of an Act passed by an earlier Congress are not ordinarily of great weight, and the views of the committee of one House of another Congress are of even less weight." (citations omitted)). To the extent the legislative history of the 1965 amendment is even relevant, that history is actually *favorable* to Capato, as it shows that "Congress *assumed* that the biological children of married parents are eligible for benefits." Resp. Br. 31.

Amendments of 1965, Pub. L. No. 89-97, § 339(a), 79 Stat. 286, 409-10 (1965), *codified at* 42 U.S.C. § 416(h)(3). The "preference for avoiding surplusage constructions is not absolute," *Lamie v. U.S. Trustee*, 540 U.S. 526, 536 (2004), and it ought not lead the Court to adopt a forced construction of Section 416(e).

Finally, the Commissioner invokes principles of administrative deference in support of the argument that the Commissioner's regulations (and interpretations thereof) reasonably construe Sections 402(d)(1) and 416(e). Pet Br. 22-26. But because the statute's language is clear, and because Respondent's children are indisputably the biological children of Robert Capato, the Court should reject the Commissioner's argument. *E.g.*, *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002) ("In the context of an unambiguous statute, we need not contemplate deferring to the agency's interpretation." (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984))).

In sum, the plain language of Section 416(e)—"[t]he term 'child' means * * * the child * * * of an individual"—must control the Court's decision despite the Commissioner's attempts to incorporate dependency requirements or potentially discriminatory standards into the definition of "child."

CONCLUSION

For the reasons set forth above and in the brief of the Respondent, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 11-159

In The
Supreme Court of the United States

MICHAEL J. ASTRUE, COMMISSIONER OF SOCIAL SECURITY,

Petitioner,

v.

KAREN K. CAPATO, ON BEHALF OF B.N.C., ET AL.,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

AMICUS BRIEF OF JENNIFER LAHL, KATHLEEN SLOAN, KATHLEEN R. LABOUNTY, STEPHANIE BLESSING, AND ANTHONY J. CARUSO, M.D., IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI[1]

Jennifer Lahl is the founder and president of the Center for Bioethics and Culture Network. In her 25-year medical career, Lahl worked as a pediatric critical care nurse, a hospital administrator, and a senior-level nursing manager. Lahl now works to voice the interests of persons excluded from discussions, developments, and policy directions associated with reproductive technologies. Her areas of expertise include the public policy dimensions of stem cell technologies and in vitro fertilization (IVF) technologies and practices. Lahl's writings have appeared in various publications including the *San Francisco Chronicle*, the *Dallas Morning News*, and the *American Journal of Bioethics*. As a field expert, she is routinely interviewed on radio and television including ABC, CBS, PBS, and NPR, and called upon to speak alongside lawmakers and persons with scientific and commercial interests in reproductive technologies. Lahl has consulted with the European Parliament in Brussels on human egg trafficking. She serves on the North American Editorial Board for *Ethics and Medicine* and the Board of Reference for Joni Eareckson Tada's Institute on Disability. Lahl has produced three documentaries: "Lines That

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[1]The parties in this case have consented to the filing of this amicus brief. Consent letters are being submitted with this brief. No counsel for any party authored this brief in whole or in part. No such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity aside from the Life Legal Defense Foundation, its members, or counsel made a monetary contribution intended to fund the preparation of submission of this brief.

Divide: The Great Stem Cell Debate" (2009); "Eggsploitation" (2010); and "Anonymous Father's Day" (2011). "Eggsploitation," an exposé on the IVF industry's exploitation of human egg donors, won the California Independent Film Festival's Best Documentary of 2011 and is now being shown in over 20 countries.

Kathleen Sloan is a women's rights advocate with expertise in issues related to third party reproduction. She was the Program Director at the Council for Responsible Genetics (CRG), where she created and led projects on women and biotechnology including egg donation, surrogacy, and global reproductive trafficking along with issues associated with genetics and race. Sloan has written articles and papers on third party reproduction published in scholarly journals. She initiated a collaborative project with CRG and the National Organization for Women (NOW) on surrogacy and is one of the principal authors of an international call for a UN Declaration on abuses of women's human rights in third party reproduction, sponsored by a coalition of academic and advocate experts on the subject from 15 countries. As a feminist leader, Sloan has focused on subjects related to the commodification of women, both as sexual and reproductive commodities, and their relationship to human trafficking and human rights violations. In September 2010, she gave the lead presentation at the UN Human Rights Council in Geneva on the media's sexual commodification of women and girls and its violation of their human rights. She convened a panel on the issue last year at the UN Commission on the Status of Women (CSW) and led Amnesty International's delegation lobbying U.S. Senators on ratification of the UN Convention on the Elimination

of all forms of Discrimination Against Women (CEDAW). Sloan is a U.S. State Department Consultant as an expert on women's issues for its International Information Program at embassies and consulates around the world. She is the former Executive Director of Connecticut National Organization for Women (CT NOW), an organization that dealt with every issue affecting the lives of women and girls. She is the founder of a task force of indigenous women's rights leaders that is planning a parallel event at this year's UN CSW related to its theme of empowering rural women. Sloan is the author of the book *Race and the Genetic Revolution: Science, Myth and Culture*, is on the Board of Directors of NOW, is on NOW's Global Feminist Strategies & Issues Committee, and represents NOW as an NGO at the United Nations. Sloan has spoken at the U.S. Capitol and at Harvard, Columbia, Yale, and University of Virginia Law Schools on abuses of women's human rights in third party reproduction and on the need for regulation of the infertility industry and for long-term studies of health risks to women associated with these procedures. Sloan is a state-certified Domestic Violence Counselor & Advocate and was awarded a Cochran Fellowship by the U.S. Department of Agriculture (USDA), promoting Russian-American cooperation. Sloan holds a Master's Degree in International Relations. She has marched, given speeches, testified at public hearings, worked in innumerable international, national, and local coalitions, organized, written about, and run campaigns, and lobbied for women's rights for 15 years.

Kathleen R. LaBounty was conceived through the use of donor sperm in 1981. Since her early teenage

years, LaBounty has been searching, thus far unsuccessfully, for her biological father. LaBounty blogs on donor conception at Child of a Stranger: Conception Through Anonymous Sperm Donation (http://childofastranger.blogspot.com). LaBounty has also been involved in legal and legislative efforts on behalf of donor-conceived children.

Stephanie Blessing found out in May 2009, at the age of 32 years old, that she was conceived in 1976 by an anonymous sperm donor via artificial insemination. Like many adults who discover that they were conceived using this method, she suddenly found herself in a crisis moment. She quickly went to the internet in order to find some kind of assistance in helping her to reason through this new situation in her life. After searching for several weeks, she found that, aside from some clinical articles, no one was talking about this issue from a God-centered perspective. She has begun writing about her own story in order to share the hope that she has with others at her blog, My Father's Daughter (http://donorchild.blogspot.com/).

Dr Anthony J. Caruso is a board certified reproductive endocrinologist who has been one of Chicago's most respected practitioners. He has worked both in private and academic practices. Caruso, who graduated from Loyola University Stritch School of Medicine, started working in the IVF field in 1995 and oversaw more than 1,000 IVF procedures in his career before leaving the field in 2010. While initially seeing the process as a way to bring happiness to someone's marriage, he has come to recognize the abuses inherent in IVF and the resultant objectification of women and children. Caruso has also suffered through the ordeal of discussing "selective reduction" with

couples, recommending against it as a form of abortion. In his current practice, he has seen the result of IVF pregnancies, which have been more likely to have complications, and an accompanying parental detachment felt toward the developing child. Some have actually told him that they could "just go back and do it again" if something untoward should happen.

This brief is being filed in support of respondent on a question of statutory interpretation. Moreover, amici wish to emphasize that the posthumously conceived children at issue are entitled to full human love and respect. This brief should not be taken in any way, however, as an endorsement of the technological process by which the respondent's twins were brought, fatherless, into the world. Amici wish instead to call this Court's attention to the highly problematic side of IVF.

SUMMARY OF ARGUMENT

1. The "dependency" prerequisite for survivor benefits under the language of the Social Security Act is not an obstacle to the children's claim in this case because a separate statutory provision of the same Act deems the children here dependent as of the time of decedent's death.

2. Children conceived by in vitro fertilization (IVF) are as much children entitled to love, respect, and protection as any other child. In no way should any qualms about the parents' resort to IVF technology justify penalizing the children for the nature of their origin.

3. The inherent worth and dignity of IVF children does not, however, derive from IVF's processes; nor does that dignity remove IVF's procedures and

practices from scrutiny. While often portrayed as a purely positive development in technology, IVF, with its numerous medical complications, invasive procedures, and commercialization of human reproduction, in fact poses a range of risks to children, parents, donors/sellers of genetic material, and society at large. This Court should keep in mind "the rest of the story" -- described herein -- to the extent considerations of public policy enter into this Court's analysis.

ARGUMENT

I. THE DEPENDENCY ELEMENT OF § 402(d) IS NOT AN OBSTACLE TO ENTITLEMENT TO SURVIVOR BENEFITS IN THIS CASE.

The parties focus on whether such a child is a "child" for purposes of 42 U.S.C. § 402(d). The Third Circuit left for remand the question whether the posthumously conceived children here satisfied a different statutory precondition -- the "dependency" element of § 402. Pet. App. 12a. That element is not an obstacle here.

The "dependency" provision restricts eligibility to a child who was "dependent upon [the deceased parent], . . . if such [parent] has died, at the time of such death," § 402(d)(1)(C)(ii) (Pet. App. 48a). Obviously, children who did not yet exist at the time of their father's death could not possibly be *actually* dependent upon him "at the time of such death." Nevertheless, § 402(d)(3) provides that a child "shall be *deemed* dependent upon his father . . . at the time specified in paragraph (1)(C)" (emphasis added), so long as the child "is" (not "was") the "legitimate" or "adopted" child of the decedent. This seems to mean that one's

biological offspring from a marriage are "deemed" dependent at the time of one's death no matter how far in the future the children are actually conceived. Hence, the children at issue here, who concededly are the legitimate children of the decedent, satisfy the "dependency" element of the Social Security Act.

II. IVF CHILDREN ARE AS FULLY HUMAN AS ANY OTHER HUMAN OFFSPRING.

Any human being, no matter how conceived, possesses inestimable dignity. This notion reflects "our basic concept of the essential dignity and worth of every human being -- a concept at the root of any decent system of ordered liberty." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 22 (1990) (internal quotation marks and citation omitted).

An IVF child is most certainly a "child" entitled to basic human respect. In no way should the children here be legally penalized just because of the nature of their origin. "[V]isiting this condemnation on the head of an infant is illogical and unjust." *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972). "[I]t is unjust and ineffective for society to express its condemnation of procreation [in certain circumstances] by punishing the . . . child who is in no way responsible for his situation and is unable to change it." *Parham v. Hughes*, 441 U.S. 347, 352 (1979).

This does not mean, however, that IVF is an unalloyed good or that public policy should promote IVF. To the extent that public policy questions bear upon the construction of the relevant statutory

provisions,[2] this Court should approach the analysis with a more complete understanding of IVF, in particular bearing in mind the more disturbing sides of IVF.

III. IVF POSES PHYSICAL, EMOTIONAL, AND SOCIETAL RISKS THAT SHOULD NOT BE IGNORED.

To the casual consumer of media coverage of the subject, IVF may appear an unmitigated boon. Thanks to the wonders of science, an infertile couple can now conceive and bear a baby! Should not public policy favor this almost miraculous technology?

To be sure, every child possesses inherent worth; the pain of infertility is real and deep; and many families count themselves the infinitely grateful beneficiaries of "test tube baby" technology.

But that is not the whole story. There are numerous countervailing factors that need to be taken into account. What follows is an enumeration of some of those weights resting on the other side of the balance.

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[2]Respondent has contended that extending benefits to posthumously conceived children comports with "the central purpose of the Act," Opp. at 23. But to the extent that purpose consists of an intent to "*maintain* normal family life," *id.* at 25, "*keep* the young children with their mother," *id.* at 24, "*replace* the support *lost* by a child," *id.* at 26, "soften[ ] the impact . . . on the *remaining* family unit," *id.* at 27, and guard against the "*vicissitudes* of life," *id.* at 24 (all emphases added; internal quotation marks omitted), the *deliberate* posthumous *expansion* of family size (and thus of the number of beneficiaries) does not correspond with that purpose any more than would a posthumous adoption. *See* U.S. Br. at 6, 22.

A. Risk to the IVF child's physical health

Studies have begun to document the increased likelihood that an IVF baby will suffer from a variety of adverse conditions. These include:

- **Beckwith-Wiedemann Syndrome**[3] -- *see, e.g.*, Jane Halliday et al., "Beckwith-Wiedemann Syndrome and IVF: A Case-Control Study," 75 Am. J. Hum. Genet. 526 (2004)[4] (concluding children conceived by IVF are significantly more likely to have BWS);

- **major structural defects** -- *see, e.g.*, J. Reefhuis et al., "Assisted reproductive technology and major structural birth defects in the United States," Human Reproduction

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[3]According to an NIH website,

> Beckwith-Wiedemann syndrome (BWS) is a growth disorder characterized by macrosomia, macroglossia, visceromegaly, embryonal tumors (e.g., Wilms tumor, hepatoblastoma, neuroblastoma, and rhabdomyosarcoma), omphalocele, neonatal hypoglycemia, ear creases/pits, adrenocortical cytomegaly, and renal abnormalities (e.g., medullary dysplasia, nephrocalcinosis, medullary sponge kidney, and nephromegaly). Early death may occur from complications of prematurity, hypoglycemia, cardiomyopathy, macroglossia, or tumors. . . . Growth rate slows around age seven to eight years. Hemihyperplasia may affect segmental regions of the body or selected organs and tissues.

Cheryl Shuman et al., "Beckwith-Wiedemann Syndrome," Bookshelf, www.ncbi.nlm.nih.gov/books/NBK1394/.

[4]www.ncbi.nlm.nih.gov/pmc/articles/PMC1182036/.

(accepted Oct. 2, 2008)[5] (IVF and ICSI[6] associated with septal heart defects, cleft lip, esophogeal atresia, and anorectal atresia); Darine El-Chaar et al., "Risk of birth defects increased in pregnancies conceived by assisted human reproduction," 92 Fertility & Sterility 1557 (2009)[7] (risk of gastrointestinal, cardiovascular, and musculoskeletal defects increased with all three types of assisted human reproduction studied, with greatest increase associated with IVF);

- **gene expression maladies** -- *see, e.g.*, Sunita Katari et al., "DNA methylation and gene expression differences in children conceived *in vitro* or *in vivo*," Human Molecular Genetics (accepted July 9, 2009)[8] (IVF may affect gene expression); Tom Blackwell, "In-vitro fertilization linked to rare genetic disorders,"

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[5]http://humrep.oxfordjournals.org/content/24/2/360.long.

[6]Intracytoplasmic sperm injection (ICSI), rather than letting the sperm penetrate the egg (oocyte) by itself, directly injects the sperm into the egg. Gina Kolata, "New Questions About Popular Fertilization Technique," New York Times (Mar. 30, 1999), *available at* www.nytimes.com/1999/03/30/health/new-questions-about-poplar-fertilization-technique.html?pagewanted=all.

[7]www.fertstert.org/article/S0015-0282(08)03574-7/abstract.

[8]http://hmg.oxfordjournals.org/content/18/20/3769.abstract?maxtoshow=&HITS=10&hits=10&RESULTFORMAT=&fulltext=Sapienza&searchid=1&FIRSTINDEX=0&resourcetype=HWCIT.

National Post (Sept. 25, 2011)[9] (presentation by Dr. Rosanna Weksberg, physician who supports IVF and works at Toronto's Hospital for Sick Children, on genetic risks to IVF children at conference of the Canadian Fertility and Andrology Society, noting "she is already seeing many fertility-treatment offspring with one of the [rare genetic conditions] show up at her genetics clinic");

- **retinoblastoma**[10] – *see, e.g.*, Annette C. Moll et al., "Incidence of retinoblastoma in children born after in-vitro fertilization," 361 The Lancet 309 (Jan. 25, 2003)[11] ("[r]elative risks for retinoblastoma were significantly raised").

The risk of health problems for the baby may be a greater problem if the IVF is accomplished by injection of the sperm into the egg, i.e., the "ICSI" technique. *See supra* note 6. Gerald F. Cox et al., "Intracytoplasmic Sperm Injection May Increase the Risk of Imprinting Defects," 71 Am. J. Hum. Genet.

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[9]http://news.nationalpost.com/2011/09/25/in-vitro-fertilization-linked-to-rare-genetic-disorders/.

[10]According to an NIH website, "Retinoblastoma (RB) is a malignant tumor of the developing retina that occurs in children, usually before age five years." Dietmar R. Lohmann & Brenda L. Gallie, "Retinoblastoma," Bookshelf, www.ncbi.nlm.nih.gov/books/NBK1452/.

[11]www.thelancet.com/journals/lancet/article/PIIS0140-6736%2803%2912332-X/abstract.

162 (2002)[12] (analyzing ICSI as possible cause of Angelman syndrome[13]).

Obviously, many IVF babies are born healthy, at least so far as we know at present. But the emerging scientific research strongly suggests that, in general, babies conceived by IVF are less likely to be unimpaired. Tampering with the process of human development at the earliest stages is not without cost. *See* generally Gina Kolata, "Picture Emerging on Genetic Risks of IVF," New York Times (Feb. 16, 2009).[14]

B. Risk to the genetic mother's physical health

IVF requires extracting -- "harvesting" -- eggs from a woman, be it the mother seeking her own biological

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[12]www.ncbi.nlm.nih.gov/pmc/articles/PMC384973/.

[13]According to an NIH website,

> Angelman syndrome (AS) is characterized by severe developmental delay or intellectual disability, severe speech impairment, gait ataxia and/or tremulousness of the limbs, and a unique behavior with an inappropriate happy demeanor that includes frequent laughing, smiling, and excitability. Microcephaly and seizures are also common.

Aditi I. Dagli & Charles A. Williams, "Angelman Syndrome," Bookshelf, www.ncbi.nlm.nih.gov/books/NBK1144/.

[14]www.nytimes.com/2009/02/17/health/17ivf.html?pagewanted=1&_r=2&emc=eta1.

offspring or a "donor"[15] who supplies the gametes but not the ultimate home for the child. "Procedures Tutorial," The New Jersey Center for Fertility and Reproductive Medicine, LLC, www.thenewjersey infertilitytreatmentcenter.com/egg_retrieval.php.

The process of preparing the mother's body for this extraction entails injection with hormones to stimulate egg production.[16] "Ovarian stimulation uses hormonal medication to stimulate the ovaries to release a larger number of oocytes than normal, in order to provide enough good quality oocytes for fertilization in vitro." "Could Ovarian Stimulation Cause an Increase in

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[15]The term "donor," used for both "egg donors" and "sperm donors," is a misnomer, as the individuals supplying their gametes are typically paid. David Tuller, "Payment Offers to Egg Donors Prompt Scrutiny," New York Times (May 10, 2010), *available at* www.nytimes.com/2010/05/11/health/11eggs.html ("A typical payment for sperm donation is under $100," while compensation for egg "donors" ranges upward from $5,000). *E.g.*, "Become an Egg Donor," Shady Grove Fertility, www.shadygrovefertility.com/become-egg-donor ($6,000+ for egg donors, who are then issued an IRS 1099); "Becoming an Egg Donor," Egg Donation, Inc., https://www.eggdonor.com/donors/ (compensated $5,000-$10,000). *See also* Debra J. Saunders, "Embryos made to order," New York Times (Aug. 8, 2006), *available at* http://townhall.com/columnists/debrajsaunders/2006/08/08/embryos_made_to_order/page/full/ ("[Bioethicist Arthur] Caplan can't stand the language used in the embryo biz. Don't call them egg donors and sperm donors, he says. Call them 'egg sellers and sperm sellers'").

Presumably the term "donor" is used to confer an air of humanitarian beneficience to the practice.

[16]*Id.* at www.thenewjerseyinfertilitytreatmentcenter.com/medication_protocols.php.

Oocyte Chromosome Abnormalities?" Science Daily (July 3, 2011).[17]

This artificial ovarian stimulation subjects the woman to health risks, most notably the risk of hyperstimulation syndrome, a condition that is fairly common and in rare cases can be life-threatening. Dr. Marcus, "Risks and complications of IVF treatment," IVF-Infertility.com;[18] "Ovarian hyperstimulation syndrome," MedLinePlus (NIH website).[19]

Other risks include:

- **ovarian cancer** -- *see* F.E. van Leeuwen et al., "Risk of borderline and invasive ovarian tumours after ovarian stimulation for in vitro fertilization in a large Dutch cohort," Human Reproduction

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[17]www.sciencedaily.com/releases/2011/07/110703222935.htm.

[18]www.ivf-infertility.com/ivf/standard/complications/ovarian_stimulation/ohss.php.

[19]www.nlm.nih.gov/medlineplus/ency/article/007294.htm. Ovarian stimulation may also jeopardize the future IVF child.

> Ovarian stimulation undertaken by women of advanced maternal age (over 35 years) receiving fertility treatment may be disrupting the normal pattern of meiosis -- a critical process of chromosome duplication followed by two specialized cell divisions in the production of oocytes and sperm -- and leading to abnormalities of chromosome copy numbers (aneuploidy) that result in IVF failure, pregnancy loss or, more rarely, the birth of affected children with conditions such as Down's syndrome, which is caused by the inheritance of three copies of chromosome 21 (trisomy 21).

"Could Ovarian Stimulation Cause an Increase in Oocyte Chromosome Abnormalities?" Science Daily, *supra*.

(accepted Sept. 2, 2011) (ovarian stimulation for IVF may increase the risk of ovarian malignancies);[20]

- **adnexal torsion (ovarian twisting)** -- Dr. Marcus, "Risks and complications of IVF treatment," IVF-Infertility.com;[21]

- **injury from the egg collection process** -- *id.*;[22] and

- **death** -- D.D.M. Braat et al., "Maternal death related to IVF in the Netherlands 1984-2008," Human Reproduction (accepted Mar. 9, 2010)[23] (finding "overall mortality related to IVF pregnancies was higher than the maternal mortality in the general population" and inferring, based upon Netherlands data, a "worldwide underreporting of IVF-related mortality").

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[20]http://humrep.oxfordjournals.org/content/early/2011/10/19/humrep.der322.full.pdf+html.

[21]www.ivf-infertility.com/ivf/standard/complications/ovarian_stimulation/adnexal_torsion.php.

[22]www.ivf-infertility.com/ivf/standard/complications/egg_collection.php.

[23]http://humrep.oxfordjournals.org/content/early/2010/05/18/humrep.deq080.

C. Death or freezing of "extra" human embryos

The success rate for IVF -- measured by live births -- will vary according to a number of factors. "Fertility Experts Warn Some IVF Success Rates May Be Misleading," Medical News Today (Apr. 3, 2009).[24] To enhance the prospects of a successful delivery, IVF clinics may "harvest" and fertilize multiple eggs, yielding multiple human embryos. "Number of eggs retrieved and IVF success rates according to female age," Advanced Fertility Center of Chicago.[25]

The "best" embryos -- or those embryos preferred for other reasons -- are selected for attempted implantation.[26] "IVF embryo quality and day 3 embryo grading after in vitro fertilization. Cleavage stage embryo grading," Advanced Fertility Center of

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[24]www.medicalnewstoday.com/releases/144930.php.

[25]www.advancedfertility.com/eggspregnancyrates.htm.

[26]The selection process may itself entail procedures that risk harm to the baby. "Preimplantation genetic diagnosis (PGD) has been one of the main clinical components of assisted reproductive technologies (ARTs) since 1990." Yang Yu et al., "Evaluation of Blastomere Biopsy Using a Mouse Model Indicates the Potential High Risk of Neurodegenerative Disorders in the Offspring," 8 Molecular & Cellular Proteomics 1490 (2009) (citations omitted), *available at* www.mcponline.org/content/8/7/1490.full. Blastomere biopsy -- extracting for analysis some cells of the IVF embryo -- is "an indispensable manipulation during the PGD procedure." *Id.* Such biopsies may be harmful. *Id.* ("This study suggested that the nervous system may be sensitive to blastomere biopsy procedures and indicated an increased relative risk of neurodegenerative disorders in the offspring generated following blastomere biopsy").

Chicago;[27] "Embryo Grading," Fertility Proregistry.com.[28]

The remaining embroys are either discarded, donated, or frozen for possible future use. Gina Kolata, "The Job Nobody at the Fertility Clinic Wants," New York Times (Aug. 26, 2001).[29] As of three years ago, the number of frozen embryos in the United States was already estimated to exceed 400,000. Denise Grady, "Parents Torn Over Fate of Frozen Embryos," New York Times (Dec. 4, 2008).[30]

Discarding is obviously lethal for the embryo. The freezing and thawing process can be lethal as well. As one fertility center explains:

> We define embryo survival based on the number of viable cells in an embryo after thawing. An embryo has "survived" if >50% of the cells are viable. We consider an embryo to "partially survive" if <50% of its cells are viable, and to be "atretic" if all the cells are dead at thaw. Approximately, 65-70% of embryos survive thaw, 10% partially survive, and 20-25% are atretic.

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[27] www.advancedfertility.com/embryoquality.htm.

[28] www.fertilityproregistry.com/content/embryo-grading.asp.

[29] www.nytimes.com/2001/08/26/us/the-job-nobody-at-the-fertility-clinic-wants.html?src=pm.

[30] www.nytimes.com/2008/12/04/us/04embryo.html?pagewanted=all.

"Embryo Freezing (Cryopreservation)," Genetics & IVF Institute (fertility center in Fairfax, Virginia and North Bethesda, Maryland).[31]

If "too many" embryos implant, the physicians may employ "selective reduction" -- taking the lives of the "excess" children in an intrauterine abortion -- to lower the number of babies to reach a more desirable total. *See, e.g.*, Ruth Padawer, "The Two-Minus-One Pregnancy," New York Times (Aug. 10, 2011);[32] Dr. Marcus, "Risks and complications of IVF treatment," IVF-Infertility.com.[33]

In short, the adorable baby at the end of the process may follow a trail of cadavers and/or children left in icy limbo.[34]

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[31] www.givf.com/fertility/embryofreezing.shtml.

[32] www.nytimes.com/2011/08/14/magazine/the-two-minus-one-pregnancy.html?_r=1&pagewanted=all.

[33] www.ivf-infertility.com/ivf/standard/complications/multiple_pregnancy4.php.

This "selective reduction" can have adverse psychological consequences for the parents. Elizabeth Ring-Cassidy & Ian Gentles, "Multifetal Pregnancy Reduction," in *Women's Health After Abortion: The Medical and Psychological Evidence* (2003), *available at* www.deveber.org/text/chapters/Chap13.pdf. *See also* Meredith O'Brien, "Selective Reduction: A Painful Choice," babyzone, www.babyzone.com/preconception/infertility/tests_and_treatments/article/selective-reduction.

[34] In the United Kingdom, the ratio is roughly 23 or 24 embryos created for each live baby born. Specifically, there were 3,144,386 embryos created through all forms of IVF from 1991 through June of 2010, "Embryology, Questions Asked by Lord Alton of Liverpool," http://services.parliament.uk/hansard/Lords/bydate/20110720/writtenanswers/part025.html. However, there were only some 138,000 live IVF babies born from 1991 through

D. Dismantling the family

The storybook version of IVF involves a mother, a father, and their IVF child. But often the reality departs from that vision. Depending upon the source of the infertility, third parties may be called upon to supply one or more missing elements of the procreative process. The sperm may come from a serial sperm seller. *E.g.*, Jacqueline Mroz, "One Sperm Donor, 150 Offspring," New York Times (Sept. 5, 2011).[35] *See* Dr. Marcus, "Gamete and embryo donation," IVF-Infertility.com.[36] The egg may come from a college student eager to defray tuition costs. Roni Caryn Rabin, "As Demand for Donor Eggs Soars, High Prices Stir Ethical Concerns," New York Times (May 15, 2007) (woman "concedes that she would never have done it if not for the money, $7,000 that she used to

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June of 2010. *See* www.hfea.gov.uk/docs/Latest_long_term_data_analysis_report_91-06.pdf (p.15: totals for 1991-2006); www.hfea.gov.uk/docs/2010-12-08_Fertility_Facts_and_Figures_2008_Publication_PDF.PDF (p. 4: totals for, *inter alia*, 2007 & 2008); www.hfea.gov.uk/ivf-figures-2006.html#1279 (total for 2009). (These figures add up to 130,822. The total for the first half of 2010 can be roughly estimated, based upon prior years, to range from 6,400 to 7,500.) The remaining embryos were either "stored," "discarded" "given for research," or died somewhere after the implantation attempt but before birth. "Embryology, Questions Asked," *supra*.

[35] www.nytimes.com/2011/09/06/health/06donor.html?_r=1&pagewanted=all.

[36] www.ivf-infertility.com/donation/index.php.

pay off some student loans").[37] The womb may be rented from a "surrogate" mother. Alex Kuczynski, "Her Body, My Baby," New York Times (Nov. 28, 2008).[38] Indeed, all three parental substitutions can be in play at the same time. Saunders, *supra* note 15. *See also* Pet. App. 11a.[39] The biological link between the original couple and "their" child can thus diminish to the vanishing point.

In this respect -- lack of a biological link between parents and child -- an IVF birth need not differ from a standard adoption, i.e., the primary link to the child is not biology but rather the love and desire of the new parents. There is, however, a key difference: adoption provides for an existing child in need of parents; IVF calls such a child into being. That difference may matter to the parent:

> "If I had conceived these twins naturally, I wouldn't have reduced this pregnancy, because you feel like if there's a natural order, then you don't want to disturb it. But we created this child in such an artificial manner -- in a test tube, choosing an egg donor, having the embryo placed in me -- and somehow, making a decision about how many to carry seemed to be just another choice. *The*

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[37] www.nytimes.com/2007/05/15/health/15cons.html.

[38] www.nytimes.com/2008/11/30/magazine/30Surrogate-t.html?pagewanted=all.

[39] Another option is "embryo donation," i.e., the intended mother gestates an already-conceived, biologically unrelated child. *E.g.*, Dr. Marcus, "Gamete and embryo donation," IVF-Infertility.com, www.ivf-infertility.com/donation/index.php.

pregnancy was all so consumerish to begin with, and this became yet another thing we could control."

Padawer, *supra* p. 18 (emphasis added) (quoting mother who aborted one of her healthy IVF twins). This attitudinal difference may also matter to the child, as noted in the next section.

E. Effect on the child's psyche

The first "test tube" baby was born in 1978. Kolata, "Picture Emerging," *supra* p. 12. "We're still in the first two generations of people born with assisted-reproduction technology ... and there is lots we don't know about them." Blackwell, *supra* p. 10 (quoting Dr. Roger Pierson, a University of Saskatchewan fertility scientist). The anecdotes and other data regarding these children are just beginning to be compiled. Early indications are that there may be several emotional or psychological consequences to watch for among this population.

For example, such children, upon learning about their origins, may consider themselves as somehow a "product" of science and human manipulation. *See* Frances Hardy & Diana Appleyard, "Caroline was fathered by a sperm donor -- so why does she bitterly resent the stranger who gave her life?" Daily Mail (June 25, 2010)[40] (IVF child: "In my view, it is a horrible, clinical way to be conceived. All my life I've felt as if I'm only half a person"); Wesley Smith, "I Have a Right to a Baby Girl! Using IVF for Sex

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[40]www.dailymail.co.uk/femail/article-1289042/Caroline-fathered-sperm-donor--does-bitterly-resent-stranger-gave-life.html.

Selection," Secondhand Smoke[41] ("Increasingly, IVF is not about treating infertility, but about reducing reproduction to a crass consumer activity akin to choosing a breed of dog or model of flat screen television. This is objectification pure and simple").

If "donor" gametes were involved, the children may feel a profound longing to know the identity of their biological progenitors. Amy Harmon, "Hello, I'm Your Sister. Our Father Is Donor 150," New York Times (Nov. 20, 2005);[42] Barry Stevens, "The Pratten ruling: An anonymous sperm provider's son explains why it matters," Center for Genetics and Society (June 2, 2011).[43] *See generally* www.anonymousfathersday.com (documentary); The Donor Sibling Registry[44] (history and mission of website facilitating contact between members of "families which have been developed via donor conception"); Anonymous Us Project[45] (personal accounts of "voluntary and involuntary participants" in "reproductive technologies and family fragmentation").

Those children who discover that one or more simultaneously conceived siblings were discarded or "selectively reduced," meanwhile, may suffer from

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[41] www.firstthings.com/blogs/secondhandsmoke/2010/07/09/i-have-a-right-to-a-baby-girl-using-ivf-for-sex-selection/.

[42] www.nytimes.com/2005/11/20/national/20siblings.html?adxnnl=1&pagewanted=all&adxnnlx=325177795-OKmZ8fMFlM1cDSTlM+ywSA.

[43] www.geneticsandsociety.org/article.php?id=5739.

[44] https://www.donorsiblingregistry.com/about-dsr/history-and-mission/.

[45] http://anonymousus.org.

some form of Post Abortion Survivor Syndrome. *See* Phillip F. Ney et al., "Post Abortion Survivor Syndrome: Signs and Symptoms," 25 Birth Psychology 107 (Dec. 2010)[46] (abstract: "Correlations and stepwise regression analyses demonstrated a cluster of existential symptoms for those surviving when their siblings were aborted").

F. Creation of exploitative markets

IVF has become a business.[47] Any business operating at the core of powerful human instincts -- like the instinct to reproduce -- is bound to give rise to exploitation of human needs and emotions. When the business deals with human bodies and tissues, the danger of exploitation becomes that much more grave. These dangers are already materializing with the IVF industry. *See, e.g.*, www.eggsploitation.com (documentary); "San Diego attorney pleads guilty in 'baby-selling

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[46]http://birthpsychology.com/journal-article/post-abortion-survivor-syndrome-signs-and-symptoms.

[47]*E.g.*, "Concerned About the Cost of IVF? Our Shared Risk IVF Program Offers Success or 100% Refund," Shady Grove Fertility, www.shadygrovefertility.com/shared_risk/?gclid=CJuKkevToq0CFQ3DtgodDDH8mA ("lock in a fixed cost for up to six IVF treatment cycles and receive a 100% refund if a baby is not delivered"); "Clear & Affordable Fees," Washington Fertility Center, www.washingtonfertility.com/fees.htm (listing price options, including "IVF Three for Two" deal and "IVF Baby Guarantee . . . (or Your Money Back)"); www.medicaldiscounts.com/fertility.htm ("Affordable Discount Low Cost Cheap State-of-the-Art International IVF").

ring,'" L.A. Now (Los Angeles Times blog) (Aug. 9, 2001)[48] (IVF profiteering scheme).

* * *

It is too early to know with confidence the extent of -- much less exhaustively to identify -- the unintended adverse consequences of IVF technology. What evidence has emerged thus far suggests IVF poses an array of serious dangers to women, children, medicine, and society at large.

CONCLUSION

This Court should decide this case in a way that recognizes the dangers inherent in modern reproductive technologies like IVF.

Respectfully submitted,

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February 6, 2012

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[48] http://latimesblogs.latimes.com/lanow/2011/08/san-diego-attorney-pleads-guilty-in-baby-selling-ring.html.

AMICUS CURIAE BRIEF

No. 11-159

In The Supreme Court of the United States

MICHAEL J. ASTRUE, COMMISSIONER OF SOCIAL SECURITY,

Petitioner,

v.

KAREN K. CAPATO, ON BEHALF OF B.N.C., et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF NATIONAL SENIOR CITIZENS LAW CENTER AND NATIONAL ORGANIZATION OF SOCIAL SECURITY CLAIMANTS' REPRESENTATIVES AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

The **National Senior Citizens Law Center** ("NSCLC") is a non-profit organization that advocates nationwide to promote the independence and well-being of low-income older persons and people with disabilities. For 40 years, NSCLC has served low-income older persons through advocacy, litigation, and the education and counseling of local advocates nationwide. From the beginning, NSCLC has had a core interest in the Social Security program and in assuring that benefits are made available to the program's intended beneficiaries. NSCLC's *Federal Rights Project* works to ensure access to the federal courts to enforce safety net and civil rights statutes. NSCLC has participated as counsel in numerous lawsuits involving benefits under the Social Security Act. NSCLC is profoundly concerned about the impact that the Court's decision may have on its clients' access to benefits.

The **National Organization of Social Security Claimants' Representatives** ("NOSSCR") is a national membership organization comprising approximately 4,000 professionals, mostly attorneys,

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that no counsel for a party authored this brief in whole or in part and that none of the parties or their counsel, nor any other person or entity other than *amici*, its members or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing this brief, and letters of consent have been lodged with the Clerk of the Court.

who represent individuals applying for Social Security benefits under Titles II and XVI of the Social Security Act. NOSSCR members include employees of legal services organizations, educational institutions, and other non-profits; employees of for-profit law firms and other businesses; and individuals in the private practice of law. NOSSCR members represent Social Security and SSI claimants before the Social Security Administration and in the courts. NOSSCR has a great interest in ensuring that its members' clients get the benefits for which they qualify.

SUMMARY OF ARGUMENT

When Congress enacted the survivor benefits provisions of the Social Security Act ("Act"), in vitro fertilization had not yet resulted in a human birth. At that time, Congress was unaware that this future technology would succeed in facilitating procreation, and therefore could not possibly have addressed this technology. While other forms of reproductive technology had been developed, Congress did not choose to limit benefits for children produced with the assistance of science. Instead, Congress enacted a broad definition of a "child" that disregards any scientific procedures assisting with procreation.

The statute provides that the natural child of married parents is a "child" entitled to benefits. 42 U.S.C. § 416(e)(1). A biological child of a married couple conceived through posthumous in vitro fertilization meets this definition. As a result, there is no

need to determine "whether the applicant is a child" under the law's provision for addressing whether to impart benefits to illegitimate children, 42 U.S.C. § 416(h). Because the statutory text is unambiguous in awarding benefits under the definition in § 416(e), there is no need to give deference to the contrary view of the government that the children are excluded by the provision concerning illegitimate children.

The government and the Fourth Circuit contend that children conceived through posthumous in vitro fertilization should be excluded from survivor benefits, on the ground that the Social Security Act is primarily intended to provide benefits in the event of an "unexpected" death. Gov't Br. 21-22; *Schafer v. Astrue*, 641 F.3d 49, 59 (4th Cir. 2011). Neither the government nor the Fourth Circuit cite any support in the text or legislative history, and indeed no basis exists in the text or legislative history for this purported purpose of the Act. With the development of modern science, previously "unexpected" deaths are often highly predictable now, sometimes years in advance of one's actual demise. The Act does not in any way restrict benefits for survivors of parents who choose to conceive or adopt a child despite knowledge of impending death from a diagnosis of a potentially fatal illness.

As avenues for creating life and means for predicting death expand, the interpretation of the Social Security Act should be governed by the statute's fundamental goal of providing "adequate protection to

the family" of a deceased wage-earner. H.R. Rep. No. 728, 76th Cong., 1st Sess., 7 (1939). The father of the Capato twins paid Social Security taxes on his earnings with the expectation that it would insure his family against financial hardship, in the event of his death. It comports with the goals of the Social Security Act to provide benefits to the family of the insured. The statute's goals should not be contorted to view human beings as nothing more than their parents' "reproductive plans." Gov't Br. at 22; *Schafer*, 641 F.3d at 59.

ARGUMENT

I. THE PROVISION OF SURVIVOR BENEFITS COMPORTS WITH THE TEXT OF THE SOCIAL SECURITY ACT

Congress amended the Social Security Act in 1939 to include survivor benefits for children, Social Security Act Amendments of 1939, Pub. L. No. 76-379, tit. II, § 402, 53 Stat. 1360, 1363, and then again in 1965 to expand the definition of a "child" born out of wedlock who can receive survivor benefits, Old-Age, Survivors, and Disability Insurance Amendments of 1965, Pub. L. No. 89-97, tit. III, § 339, 79 Stat. 286, 409. When these provisions were enacted, posthumous conception through in vitro fertilization ("IVF") was not scientifically possible. As a result, Congress could not have addressed IVF when it enacted these provisions.

Some forms of reproductive technology to assist couples in overcoming infertility had been developed at that time. For instance, the use of artificial insemination became widespread in the 1960s. Stacey Sutton, *The Real Sexual Revolution: Posthumously Conceived Children*, 73 ST. JOHN'S L. REV. 857, 862 (1999). It was not until thirteen years later that the first successful birth of a "test tube baby" utilizing IVF occurred in England in 1978. *Id.* at 865. The technology rapidly spread worldwide, with thousands of successful IVF births in the United States over the next decade. Elizabeth Ann Pitrolo, *The Birds, The Bees and the Deep Freeze: Is There International Consensus in the Debate Over Assisted Reproductive Technologies*, 19 HOUS. J. INT'L L. 147, 149 (1996).

The Act's provisions regarding survivor benefits do not address reproductive technology, not even mentioning those methods in existence at the time of passage. Sweeping broadly, the law utilizes a wide-reaching definition of a child survivor that does not exclude children created with the assistance of reproductive technology. In 42 U.S.C. § 402(d)(1), the statute states that "Every child (as defined in section 416(e)) . . . shall be entitled to a child's insurance benefit." The words "every" and "shall be entitled" demonstrate congressional intent to confer a clear right to benefits for an expansive and inclusive group of children. This definition makes it clear that the use of reproductive technology does not factor into entitlement for benefits.

The survivor benefits provision, 42 U.S.C. § 402(d)(1), explicitly references the definition of a "child" in 42 U.S.C. § 416(e), wherein the statute identifies three types of parents: natural parents, adoptive parents, and stepparents. Accordingly, the definition of a child in § 416(e)(1) as a "child or legally adopted child of an individual," is not a tautology, as suggested by the government and the Fourth Circuit. Gov't Br. 11; *Schafer*, 641 F.3d at 64. Instead, § 416(e)(1) refers to a biological or adopted child, as distinguished from the child of a stepparent referenced in § 416e(2). There is no basis in the definition of a child in § 416(e) to exclude a child conceived through posthumous IVF.

Children whose birth was facilitated by posthumous IVF meet the definition of a "child" in § 416(e). Biological parenthood or adoption, not reproductive technology, establish who is a child of an insured wage-earner.

Because the Capato twins' parents were married, there is no need to address the question of "whether an applicant is a child," under the criteria for children of unwed parents in § 416(h)(2)(A). Through the first half of the twentieth century, the legal presumption that a married father was the natural father of his children was virtually insurmountable, with the exception of African-American babies born to white couples. Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 547, 565 n.142 (2000). Up until the development of the human leukocyte

antigen ("HLA") blood test in the late 1970s, blood testing for paternity was quite unreliable. *Id.* at 555. In the late 1980s, genetic testing with 99% accuracy was developed. *Id.* Nevertheless, the "presumption of legitimacy" remains "a fundamental principle of the common law," and marriage to a child's biological mother is sufficient to establish paternity. *Michael H. v. Gerald D.*, 491 U.S. 110, 124 (1989).

The enactment of § 416(h) was designed to increase the number of illegitimate children obtaining benefits. Congress estimated that 20,000 children would gain immediate access to survivor benefits as a result of the "[b]roadened definition of child" in § 416(h). S. Rep. No. 89-404, S. Rep. No. 404, 89th Cong., 1st Sess. 1965, 1965 U.S.C.C.A.N. 1943, 1945. This provision was not intended to call into question whether the child of a married couple is truly the "child" of the father.

As this Court recently noted, when statutory text is not ambiguous, the court "need not consider the Government's assertion that we should defer to the [agency's] interpretation." *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2303 n.8 (2011). Because the statutory text resolves the issue in this case, the contrary interpretation of the government is not entitled to deference.

II. THE PROVISION OF SURVIVOR BENEFITS COMPORTS WITH THE PURPOSE OF THE SOCIAL SECURITY ACT

Rather than pointing to any words in § 416(e) that justify denial of benefits, the government conjures up an unfounded purpose of the Act, claiming that the statute primarily seeks to help children for whom the death of a parent was "unexpected." Gov't Br. 22. Nowhere in the Act's text does the statute limit survivor benefits to instances where the death of a parent was "unexpected." Tellingly, the government does not cite the statute or any legislative history as a basis for this purported goal of the Act. The government cites the Fourth Circuit's recitation of this supposed purpose in *Schafer v. Astrue*, 641 F.3d at 59, which likewise did not point to any words in the statute or legislative history. The government further cites *Matthews v. Lucas*, 427 U.S. 495, 507 (1976). Gov't Br. 21. *Lucas* did not consider whether survivor benefits are designed to assist families principally in the event of an unexpected death. The Court did not address in *Lucas* whether the death of the wage-earning biological father was expected or a surprise. The case concerned whether an illegitimate child was dependent on the biological father prior to the father's death. The question of dependency[2] is

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[2] This brief does not address the issue of dependency which was not reached by the Third Circuit but rather was remanded to the district court with instructions to remand that question to the Commissioner to resolve as a factual matter in further administrative proceedings.

distinct from the definition of a child in § 416(e), and this Court's decision regarding dependency in *Lucas* provides no support for the government's contention that Congress limited benefits in § 416(e) to those families in which a parent's death was "unexpected."

The ability to predict disease and death is advancing over time with the advent of modern scientific discoveries.[3] In the past decade, the Human Genome Project has successfully mapped out the sequence of human genes, which is expected to lead to the development of highly effective diagnostic tools. NATIONAL HUMAN GENOME RESEARCH INSTITUTE, *The Human Genome Project Completion: Frequently Asked Questions* (last updated Oct. 30, 2010), http://www.genome.gov/11006943. There are presently fairly accurate gene tests for a propensity to develop Alzheimer's disease and breast cancer, although other genetic tests are not yet as accurate. Robert Langreth, *Gene Tests that Predict When You Will Die*, FORBES MAGAZINE (2010), http://www.forbes.com/sites/robertlangreth/2010/10/14/gene-tests-that-predict-when-you-will-die/. As technology develops, individuals will have increased information about the timing of their

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[3] In a general sense, every rational person expects to die. For example, a worker performing a hazardous job – even an ordinary truck driver or delivery driver – knows that he or she may die that very day. And anyone who commutes to work knows that he or she may die on the way to work. Historically the life of any parent was precarious, particularly the mother in childbirth and the father in ordinary but hazardous work activity.

deaths. *See, e.g.*, Alice Park, *A Blood Test to Predict Death? It Could be Possible,* TIME MAGAZINE (2011), http://healthland.time.com/2011/08/31/a-blood-test-to-predict-death-it-could-be-possible/?xid=huffpo-direct.

Moreover, with the assistance of reproductive technology, older individuals, who have a shorter expected future lifespan, are able to produce children. In 2009, in the US, women ages 40-44 gave birth to 105,827 babies; women ages 45-50 gave birth to 7,320 babies; and women ages 50-54 gave birth to 569 babies. Joyce Martin, et al., NATIONAL VITAL STATISTICS REPORT, *Births: Final Data for 2009,* at Table 2 (2011), *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr60/nvsr60_01.pdf. Likewise, a significant percentage of men over 50 are fathers of newborns. In 2009, 2.6% of newborns had fathers ages 50-54, while .3% of newborns had fathers 55 years and older. *Id.* at Table 17. Also, in 2004, 1.6 million children were being raised by their grandparents. U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, *Living Arrangements of Children: 2004,* at 2 (2008), *available at* http://www.census.gov/prod/2008pubs/p70-114.pdf. Federal adoption law directs states to give preference to relatives seeking to adopt children, which encourages grandparent adoption. Sara Mills, *Perpetuating Ageism Via Adoption Standards and Practices*, 26 WIS. J.L. GENDER & SOC'Y 69, 99 (2011). No one questions the potential right of these children to survivor benefits on the earnings record of their adoptive grandparents.

The Social Security Act does not address the ability of science to predict death. It provides benefits to children irrespective of whether a parent's death was expected for years or was a surprise. The statute contains no moral judgments regarding parents' desire to procure children biologically, with or without reproductive technology, or through adoption, when death is expected in the near future due to a diagnosis of a potentially fatal disease or advanced age.

The actual purpose of the Act can be found by looking at the text and legislative history of the statute. The statutory text demonstrates that its aim is to establish the entitlement of children to survivor benefits based on the death of a fully insured parent. 42 U.S.C. § 402(d)(1). The legislative history indicates that Congress' goal when enacting this provision in 1939 was to provide "more adequate protection to the family as a unit." H.R. Rep. No. 76-728, at 5, 7. The legislative history of the 1965 revisions to the survivor benefits provision shows that the alteration of the statute was intended to expand coverage to thousands of children born out of wedlock who had previously been excluded from benefits. S. Rep. No. 89-404, S. Rep. No. 404, 89th Cong., 1st Sess. 1965, 1965 U.S.C.C.A.N. 1943, 1958.

This Court has long recognized that the "underlying purpose" of the Act is "the protection of its beneficiaries from some of the hardships of existence." *U.S. v. Silk*, 331 U.S. 704, 711 (1947). The Social Security system is "a form of social insurance . . . whereby persons gainfully employed, and those who employ

them, are taxed to permit the payment of benefits to the retired and disabled, and their dependents." *Flemming v. Nestor*, 363 U.S. 603, 609 (1960). The law "is intended to insure covered wage earners and their families against the economic and social impact on the family normally entailed by loss of the wage earner's income due to retirement, disability, or death, by providing benefits to replace the lost wages." *Califano v. Goldfarb*, 430 U.S. 199, 213 (1977). Social Security is not a public assistance statute based on need, but rather its "primary objective was to provide workers and their families with basic protections against hardship." *Matthews v. De Castro*, 429 U.S. 181, 185-86 (1976). Thus, a "primary purpose" of the "Social Security scheme is to provide support for dependents." *Jimenez v. Weinberger*, 417 U.S. 628, 634 (1974).

The Act's purpose is well served by the provision of survivor benefits to the Capato twins. Mr. Capato's payment of Social Security taxes served to insure him and his family against the economic impact of his death. As the biological children of a worker who contributed his fair share in contributions, the twins are entitled to basic protections against hardship.

The government makes several groundless policy arguments against the provision of benefits to the Capato twins. The government argues, quoting the Fourth Circuit, that the decision below would improperly "subsidiz[e] the continuance of reproductive plans." Gov't Br. at 22 (quoting *Schafer*, 641 F.3d at 59). The Fourth Circuit gave no citations for its

suggestion that children produced with the assistance of posthumous IVF are viewed by the Act as "reproductive plans" scheming to get a subsidy. This approach dehumanizes children whose birth depended on reproductive technology. It has no basis in the text or legislative history of the Act nor in this Court's jurisprudence. The provision of survivor benefits no more subsidizes the reproductive plans of couples utilizing posthumous IVF than it does the reproductive plans of married couples or an unwed parent conceiving a child without the assistance of reproductive technology. The Act provides support for children, without passing judgment on the circumstances of conception, planned or not.

The government further contends, again quoting the Fourth Circuit, that providing benefits to children conceived through posthumous IVF "threatens the interests of the Act's 'core beneficiary class: the children of deceased wage earners who relied on those earners for support.'" Gov't Br. 22 (quoting *Schafer*, 641 F.3d at 58). While 42 U.S.C. § 403(a)(1) does cap survivor benefits in some cases, nothing in the Act designates "core" beneficiaries who are more worthy than other survivors. For example, there is no dispute that a child conceived on the day before a wage earner dies is entitled to benefits, even though such a child would never have relied on the deceased for support. The government's interpretation would pit survivors against each other in a manner not supported by the purpose of the Act.

Indeed, the instant case illustrates how the government's current interpretation defeats the purposes of the Act and leads to counterproductive results. No one has questioned that Mr. and Mrs. Capato are the parents of three children, the first of whom was conceived after Mr. Capato was diagnosed with cancer and undergoing treatment. The government has acknowledged that this son, born in August 2001, shortly before Mr. Capato's death, is Mr. Capato's child eligible for survivor's benefits. But the government finds that Mr. Capato's other two children are not his survivors and not eligible for benefits on his account. Not only are these full siblings treated differently from each other, but even the first child is harmed by the government's current position. Because the later born twins are being denied benefits on their father's account, their mother (his widow) is receiving less benefits for the surviving family than she could otherwise obtain under the government's "family maximum" rules, with, consequently, less money to raise all three children.

In sum, the interpretation of § 416(e) to require the provision of survivor benefits to children conceived through posthumous IVF comports with the text, purpose, and policy concerns of the Act. The provision of survivor benefits to the Capato twins is consistent with the Act's reliance on biological parenthood, adoption, and marriage to determine parenthood and avoids moralistic judgments in determining who is a child. In this case, "considering the provision in conjunction with the purpose and

context leads us to conclude that only one interpretation is permissible." *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S.Ct 1325, 1331 (2011). By preventing financial hardship to the family of a deceased wage-earner, the provision of survivor benefits to the Capato twins fully comports with the Act.

CONCLUSION

For the reasons stated, *amici* urge the Court to affirm the decision below.

Respectfully submitted,

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